

CONFIDENTIALITY UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

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TABLE OF CONTENTS

I.	INTRODUCTION	215
II.	A FRAMEWORK FOR ANALYSIS OF RULES OF CONFIDENTIALITY ...	218
	A. <i>The Principle of a General Duty of Confidentiality</i>	218
	B. <i>The Principle of a Duty of Disclosure When Required by Law</i>	219
	C. <i>The Debate over Whether the Duty of Disclosure Should be Limited to Situations Required by Law</i>	220
	1. <i>Clients' Rights</i>	221
	2. <i>Historical Justifications</i>	222
	3. <i>Policy Considerations</i>	223
	D. <i>Disclosure Beyond Situations Required by Law: Protection of the Interests of Clients and Avoidance of Serious Violations of Law or Legal Rights</i>	227
	E. <i>The Principle of Optimum Clarity in Drafting</i>	229
III.	A CRITICAL ANALYSIS OF THE PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT	229
	A. <i>Disclosure to Protect the Interests of Third Persons</i>	230
	1. <i>Wrongful Client Conduct: Model Rule 1.6</i>	230
	2. <i>Misrepresentation by Lawyers: Model Rule 4.1</i>	233
	B. <i>Disclosure to Protect the System of Justice</i>	236
	1. <i>Perjury: Model Rule 3.3</i>	236
	2. <i>Misrepresentation and Fraud on a Tribunal: Model Rule 3.3</i>	244
	3. <i>Professional Misconduct by Other Lawyers: Model Rule 8.3</i>	247
	C. <i>Disclosure to Protect the Interests of Lawyers</i>	247
	D. <i>Disclosure to Protect the Interests of Clients</i>	249
IV.	CONCLUSION	251

I. INTRODUCTION

A recurring theme in the history of professional ethics has been controversy over the scope of a lawyer's duty of confidentiality. In the 1840s, the conduct of a well-known English barrister received considerable public attention when he was accused of unethical conduct in his representation of a defendant who had admitted committing murder.¹ Professor Freedman produced a similar controversy in 1966 when he argued that counsel representing a criminal defendant who intended to take the stand and commit perjury should not disclose such information to the court, but should instead continue to represent the defendant in the

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¹ *Regina v. Courvoisier*, 173 Eng. Rep. 869 (1840). For an extensive discussion of the case, see D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 15 (1973); see also 32 REP. A.B.A. 183 (1907).

normal fashion, including arguing the perjured testimony to the finder of fact.² In his autobiography, Professor Williston relates his decision not to inform a judge that a fact on which the judge based his decision was untrue.³ Recently, Judge Frankel took a different view and stirred considerable controversy in the profession when he argued that lawyers should have an obligation to promote truth and proposed a disciplinary rule to implement this goal.⁴

The profession is once again engaged in debate over the proper scope of the duty of confidentiality. Consideration is now being given to replacing or revising the Code of Professional Responsibility, which currently governs the ethical obligations of lawyers in almost all states.⁵ In 1977 the president of the American Bar Association appointed a special commission to reevaluate ethical standards. The Commission issued a Discussion Draft of the Model Rules of Professional Conduct in January 1980.⁶ The Discussion Draft contained important limitations on the duty of confidentiality, requiring or authorizing lawyers to reveal confidential information to prevent⁷ or rectify⁸ harm to others or to promote truth in adversarial proceedings.⁹

The Discussion Draft produced considerable debate in the profession.¹⁰ Viewing the Draft as a threat to the adversarial system, the American Trial Lawyers Association (ATLA) issued a draft of a rival Code of Conduct.¹¹ The ATLA Code allows disclosure of confidential information in very few situations.¹²

² Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

³ S. WILLISTON, LIFE AND LAW 271 (1941).

⁴ Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) [hereinafter cited as Frankel].

⁵ NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, A.B.A., CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980). The extent to which the Code has been adopted varies from state to state. In some states, both disciplinary rules and ethical considerations have been adopted, while in others only the disciplinary rules have been adopted. Compare S.C. SUP. CT. R. 32, 22 S.C. CODE ANN. (Law. Co-op. Supp. 1981) with MASS. SUP. JUD. CT. R. 3:07, Massachusetts Rules of Court (Desk Copy 1981).

⁶ ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct (Discussion Draft, Jan. 30, 1980) 48 U.S.L.W. No. 32 (BNA Feb. 19, 1980) [hereinafter cited as Discussion Draft].

⁷ *Id.* Rule 1.7(b) (requiring disclosure of privileged information to prevent a client from committing an act that would result in death or serious bodily injury).

⁸ *Id.* Rule 1.7(c)(2) (granting discretion to reveal confidential information to rectify the consequences of a wrongful act, unless the lawyer was employed after the commission of the act to represent the client concerning the act or its consequences).

⁹ *Id.* Rule 3.1(b) (requiring disclosure of confidential information to prevent or rectify the use of false evidence or testimony). *Id.* Rule 3.1(d) (requiring disclosure of facts to correct a manifest misapprehension resulting from a previous representation by lawyer). *Id.* Rule 3.1(e) (granting discretion to reveal evidence favorable to an opposing party). The Draft qualified the obligation to disclose for defense lawyers in criminal cases. *Id.* Rule 3.1(f).

¹⁰ Winer, *Radical Proposals Unveiled After 2-Year Study—Ethics Draft Ignites Uproar*, NAT'L L.J., Aug. 27, 1979, at 1, col. 1.

¹¹ Commission on Professional Responsibility of Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct*, TRIAL, August 1980, at 45 [hereinafter cited as ATLA Code].

¹² The ATLA Code deals with the scope of the duty of confidentiality in the first of its nine sections. The drafters present two alternative rules of confidentiality. Under Alternative B, lawyers may disclose confidential information that is in any way detrimental to clients only under two circumstances. First, a lawyer may reveal information to the extent required by law, by a rule of court, or by a court order, but only after good faith efforts to test the validity of the law, rule, or order have been exhausted. ATLA Code, *supra* note 11, Rule 1.3 (Alternative B). Second, a lawyer may reveal confidential information to defend himself, his associates, or his employees against formally instituted charges of misconduct, but only when the charge is at the initiation or insistence of the client. *Id.* Rule 1.4.

The Code contains a number of illustrative cases that show when disclosure would be improper. The Code prohibits lawyers from disclosing perjury by clients in either criminal or civil cases. *Id.* Illustrative Cases 1(b), 1(i), 1(j). While a lawyer must withdraw if a client threatens to commit perjury, withdrawal is

The ABA Commission has now issued a Proposed Final Draft of the Model Rules of Professional Conduct.¹³ While more protective of confidentiality than the Discussion Draft, the Proposed Final Draft still authorizes or requires disclosure of confidential information in a number of situations.¹⁴ One group of rules provides for disclosure in order to prevent or rectify harm to third persons resulting either from the conduct of clients or of lawyers. Under this group, lawyers have discretion to reveal confidential information to prevent a client from committing a criminal or fraudulent act that would result in serious harm to another person.¹⁵ Lawyers also have discretion to reveal information to rectify the consequences of a criminal or fraudulent act if the lawyer's services were involved in the act.¹⁶ The rules require lawyers to disclose information, even though confidential, if the failure to disclose would amount to a material misrepresentation, if disclosure is necessary to prevent the lawyer from assisting in criminal or fraudulent conduct, or if disclosure of confidential information is otherwise required by law.¹⁷ A second group of rules involves disclosure to maintain the integrity of the adversarial system. Under this group, lawyers are required to disclose information to a tribunal, even though the information is confidential, if the failure to disclose would be equivalent to a material misrepresentation.¹⁸ Lawyers must

improper if disclosure of confidences would result. *Id.* Rule 6.6. Under Alternative B, a lawyer is prohibited from disclosing confidential information in order to avoid serious harm to, or even the death of, others. *Id.* Illustrative cases 1(e), 1(f), 1(g), 1(k). Finally, the Code prohibits lawyers from revealing evidence adverse to their clients, even if such disclosure would materially aid the resolution of the case. *Id.* Illustrative case 1(a).

Alternative A allows for disclosure in some instances not permitted under Alternative B. Like Alternative B, Alternative A allows for disclosure when required by law, by a rule of a court or by a court order. *Id.* Rule 1.3 (Alternative A). The Rule also provides for disclosure to the extent necessary to defend charges of misconduct, but Alternative A broadens permissible disclosure by eliminating the requirement that charges be instituted by or at the insistence of the client. *Id.* Rule 1.6. In addition, the Rule provides for disclosure in two other situations. A lawyer may disclose confidential information to prevent imminent danger to human life. *Id.* Rule 1.4. Second, a lawyer may reveal a confidence when the lawyer knows that a judge or juror in a pending proceeding in which the lawyer is involved has been bribed or subjected to extortion. *Id.* Rule 1.5. Further, Alternative A broadens the circumstances in which withdrawal is permitted. Withdrawal is permitted, even if it would result in an indirect violation of confidentiality, if the client has induced the lawyer to act through material misrepresentation. *Id.* Rules 1.2, 6.5.

¹³ ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct* (Proposed Final Draft, May 30, 1981) 67 A.B.A. J. 1299 [hereinafter cited as ABA Proposed Final Draft]. The Commission issued the Draft in two formats. One, which is favored by the Commission, consists of rules followed by commentary, code comparison, and legal analysis. The other consists of modifications to the disciplinary rules of the Code of Professional Responsibility. The alternative format was adopted in response to criticisms that it would be undesirable to abandon the present format of the Code. See The National Organization of Bar Counsel, Report and Recommendations on Study of Model Rules of Professional Conduct 3 (August 2, 1980); Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074 (1980). The Commission continues to believe that a new format would be desirable because it would resolve the problem of the uncertain legal status of the ethical considerations and would present rules of ethics that are functionally related to the different roles that lawyers perform. ABA Proposed Final Draft, at 4-5 (Chairman's Introduction).

The ABA has divided the discussion of the Model Rules into questions of form and substance. The first question is whether the "Restatement" format proposed by the Commission should be adopted or whether changes should be made by amendment to the Code of Professional Responsibility. On January 26, 1982 the ABA House of Delegates approved the Restatement format. The second question, which will be addressed by the ABA at its August meeting, will focus on the substantive provisions of the rules.

¹⁴ The principal provisions dealing with confidentiality are Rule 1.6, which is the basic rule on confidentiality; Rule 3.3, which deals with the lawyer's duty of candor to tribunals; Rule 4.1, which deals with the obligation of truthfulness in statements to others; and Rule 1.13, which deals with the lawyer's obligations when representing an organization. See the appendix for the full text of these rules.

¹⁵ ABA Proposed Final Draft, *supra* note 13, Rule 1.6(b)(2).

¹⁶ *Id.* Rule 1.6(b)(3).

¹⁷ *Id.* Rule 4.1(b).

¹⁸ *Id.* Rule 3.3(a)(1).

also reveal confidential information to prevent fraud on a tribunal¹⁹ or to rectify the consequences of the introduction of false testimony such as client perjury.²⁰ A third group of rules allows disclosure to protect the interests of lawyers. These rules provide for disclosure to enable the lawyer to establish a claim or defense in a controversy between the lawyer and client, or to defend civil or criminal charges brought against the lawyer based on conduct in which the client was involved.²¹ Last, some of the rules provide for disclosure in order to protect the client's own interests,²² or when the client waives his interest in confidentiality by consenting to disclosure after being fully advised by the lawyer of the consequences.²³

This Article develops a framework for analysis of rules of confidentiality and then critically considers the Proposed Model Rules. Part II of the Article argues that rules defining the scope of the duty of confidentiality should be based on several principles. The rules should contain a general duty of confidentiality, but the duty should be subject to three exceptions. First, disclosure of confidential information should be required when lawyers have a legal duty to do so. Second, even if not required by law, rules of confidentiality should provide for disclosure in order to avoid serious harm to the legally protected interests of another person, the system of justice, or to the lawyer himself. Third, lawyers should be allowed to reveal confidential information when disclosure would be in the client's interest. In addition, rules of confidentiality should be drafted so as to achieve an optimum level of clarity. Part III of the Article applies the framework developed in Part II to the Model Rules, argues that several of the Model Rules are in need of revision, and proposes changes in the Rules.

II. A FRAMEWORK FOR ANALYSIS OF RULES OF CONFIDENTIALITY

A. *The Principle of a General Duty of Confidentiality*

Rules of ethics should impose a general duty on lawyers to maintain the confidentiality of information that could be detrimental to their clients. This general duty can be justified in several ways. First, lawyers, like other agents, have a legal duty to maintain confidentiality.²⁴ Second, there are a number of situations in which disclosure of confidential information serves no legitimate social purpose. For example, a lawyer might receive information from a client that could be used to the financial advantage of the lawyer. The general duty of confidentiality dictates that such "self-interested" disclosures are improper. Third, the duty of confidentiality supports the social roles of the lawyer as advocate and counselor by helping to remove a barrier to the functioning of those roles²⁵—the client's fear that information given to the lawyer will be revealed to

¹⁹ *Id.* Rule 3.3(a)(2).

²⁰ *Id.* Rule 3.3(a)(4).

²¹ *Id.* Rule 1.6(b)(4).

²² *Id.* Rule 1.6(b)(1), 1.13(c).

²³ *Id.* Rule 1.6(a).

²⁴ RESTATEMENT (SECOND) OF AGENCY § 395 (1958).

²⁵ For a general discussion of the policy justifications for confidentiality see 8 J. WIGMORE, EVIDENCE §§ 2291-2295 (McNaughton rev. 1961) [hereinafter cited as J. WIGMORE]; E. Morgan, Foreword, MODEL CODE OF EVIDENCE 25-27 (1942); ATLA Code, *supra* note 11, at 48-49 (Preamble). *See also* C. FRIED, RIGHT AND WRONG 181-82 (1978) (argument that society is bound to permit legal advice according to this

the detriment of the client.²⁶ Last, the profession itself is deeply committed to the value of confidentiality. It would be unrealistic to propose to the profession a code of ethics that did not generally support confidentiality.

B. The Principle of a Duty of Disclosure When Required by Law

Few would contend that the ethical duty of confidentiality is absolute. Indeed, both the drafters of the ATLA Code and the Model Rules agree that the duty of confidentiality must yield to a duty of disclosure imposed by law.²⁷ Further, such a duty of disclosure is justified by reasons of practicality and fairness. It would engender great confusion if the rules of ethics required conduct that contradicted legal requirements. Further, to impose conflicting duties on lawyers would be unfair and would entail constitutional problems because the standard of conduct would be unclear.²⁸

The principle can be made more specific by defining the instances in which a lawyer has a legal duty to disclose confidential information. A lawyer has such a duty if the failure to disclose would constitute a crime, expose the lawyer to civil liability, or violate a court or administrative order or rule. A client's mere violation of the law does not mean that a lawyer has a legal duty to disclose confidential information. Consider the situation of a securities lawyer who represents a publicly held corporation that is engaged in conduct that violates the federal securities laws. In *S.E.C. v. National Student Marketing Corp.*,²⁹ for example, corporate officials decided to consummate a merger even though proxies had been solicited on the basis of financial statements that were materially misleading. Similarly, in a recent disciplinary proceeding, *In re Carter*,³⁰ the SEC considered disciplinary action against a corporate lawyer whose client had issued misleading press releases when the financial situation of the client was deteriorating. Both decisions indicate that a corporate lawyer whose client is committing a violation of the federal securities laws has an obligation to take some action in response to the conduct, such as reporting the conduct to higher levels of the organization or, perhaps, withdrawing from representation. So long as the lawyer does not assist

traditional model because such advice is necessary to enable individuals to learn about and exercise their other rights).

²⁶ The extent to which confidentiality is really necessary to the functioning of these roles is uncertain. In many transactions, clients would be compelled to consult with lawyers even without confidentiality. For example, most clients are unable to represent themselves in civil or criminal proceedings, and so would be forced to retain counsel even without a rule of confidentiality. Furthermore, in many business transactions, a lawyer's advice is a necessity. In securities transactions, for example, a lawyer's opinion is the "passkey" to the transaction. Sommers, *Emerging Responsibilities of the Securities Lawyer* [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79, 631 (Jan. 1974). In addition, it is uncertain how much confidentiality is necessary to communication between lawyer and client. The prudent lawyer is suspicious of factual statements made by the client and will seek independent verification. Similarly, for a variety of reasons clients are often distrustful of lawyers and even with confidentiality are reluctant to be totally frank. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) [hereinafter cited as Burt].

²⁷ ATLA Code, *supra* note 11, Rule 1.3; ABA Proposed Final Draft, *supra* note 13, Rules 1.2(d), 1.6(b)(5), 4.1(b)(3).

²⁸ *In re Ruffalo*, 390 U.S. 544 (1968) (due process rights of a lawyer were violated when he was not given adequate notice of conduct subject to discipline).

²⁹ 457 F. Supp. 682 (D.D.C. 1978).

³⁰ Securities Exchange Act of 1934 Release No. 17,597 (Feb. 28, 1981) (holding that a lawyer engages in unethical or unprofessional conduct under SEC Rule 2(e) if he fails to take affirmative action when his client is engaged in a continuing violation of the securities laws, but refusing to hold that a lawyer engages in unprofessional conduct if he fails to make a disclosure). The Office of the General Counsel of the SEC has moved for reconsideration of the decision. 49 U.S.L.W. 2668 (Apr. 21, 1981).

in the illegal conduct, however, there seems to be no legal obligation to disclose the criminal conduct to the authorities. In contrast, another line of cases stands for the proposition that a criminal defense lawyer who receives either the evidence or fruits of criminal conduct has an obligation to turn such material over to the prosecution, even if the material was delivered in confidence.³¹

Whether a lawyer has a legal obligation to disclose confidential information is often uncertain. The problem is illustrated by the widely discussed case of *People v. Belge*,³² in which the lawyer represented a defendant accused of murder. The defendant told the lawyer that he had committed several murders that the police had not solved and informed the lawyer of the location of the bodies. The lawyer did not reveal this information, even though he knew that the family of one of the victims was suffering extreme anguish. At trial, the information became public when the lawyer used his knowledge of the murders to attempt to establish an insanity defense. Subsequently, the lawyer was indicted for the violation of two New York statutes—one requiring that a decent burial be provided to a deceased person, the other requiring disclosure to authorities of the death of a person without medical attendance. The trial court, holding that the legal duties found in the statutes were subordinate to the duty of confidentiality, dismissed the indictment, and its decision was affirmed by the appellate courts.

Several approaches for dealing with this problem of uncertainty are apparent. One approach would be to provide for disclosure if the failure to make such disclosure "might" constitute a violation of law. This principle is too broad because it is inconsistent with the presumption in favor of confidentiality. The second approach would be to provide for disclosure only when the violation of the law is "clear." This standard seems unsatisfactory for two reasons. First, it seems to give inadequate weight to interests other than client confidentiality. The extent of a lawyer's legal obligation to disclose confidential information is a rapidly changing area of the law, and it is doubtful that there are many "clear" disclosure obligations. As a result, this standard is tantamount to prohibiting disclosure in almost all cases. Second, the rule seems to ignore the legitimate interests of lawyers in protecting themselves against legal liability. The rule would require a lawyer to preserve confidentiality even when there was a strong likelihood that the failure to make disclosure would expose the lawyer to legal liability. The appropriate standard thus seems to fall between the two just discussed. Disclosure of confidential information should be provided for if the failure to make disclosure would be "likely" to constitute a violation of law.

C. The Debate over Whether the Duty of Disclosure Should be Limited to Situations Required by Law

A major focus of discussion about rules of confidentiality deals with situations in which disclosure is not required by law, but would prevent serious harm. Advocates of rules of strict confidentiality, such as the drafters of the ATLA Code,

³¹ *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964). A recent Note argues that attorneys should have a qualified privilege to retain rather than reveal incriminating evidence under some circumstances. A lawyer would still be required, however, to turn over the evidence if subpoenaed. Note, 32 STAN. L. REV. 977 (1980).

³² 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd mem.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

argue that disclosure is generally improper in such cases, while proponents of rules of limited confidentiality, such as the drafters of the Model Rules, generally favor disclosure to avoid serious harm. Resolution of this issue requires analysis of the arguments for strict and limited confidentiality. Three justifications, based on claims of clients' rights, history, and policy have been offered for strict confidentiality.

1. Clients' Rights

One argument made in support of strict confidentiality is that it is necessary to protect clients' legal and constitutional rights, such as the attorney-client privilege, the privilege against self-incrimination, and the sixth amendment right to counsel. For example, if rules of ethics required a criminal defense lawyer to reveal to the court information establishing the guilt of a defendant, the disclosure rule would almost certainly violate the sixth amendment. The United States Supreme Court has held that state action which substantially interferes with the lawful performance of the lawyer's role as advocate in criminal proceedings violates the sixth amendment. In *Geders v. United States*³³ the Court held that a court order prohibiting the defendant from consulting with his lawyer during a trial recess violated the sixth amendment. Similarly, in *Herring v. New York*³⁴ the Court held a state statute eliminating closing arguments in nonjury cases unconstitutional. A rule of ethics that required disclosure of evidence establishing the guilt of a client would interfere substantially with the functioning of the attorney-client relationship since it would give clients a powerful incentive not to disclose facts establishing guilt to their lawyers.

On the other hand, there are many situations in which rules of ethics could require disclosure without violating the legal or constitutional rights of clients. A rule requiring a lawyer to disclose the intention of a client to commit a criminal act that will result in death is illustrative. Such a rule would not violate the evidentiary attorney-client privilege, the privilege against self-incrimination, or the right to counsel.

The classic statement of the attorney-client privilege provides that when legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his insistence permanently protected from disclosure by himself or by the legal adviser, except when the protection is waived.³⁵ Disclosure of a client's threat to kill another person would not violate the privilege. The disclosure was not made for the purpose of obtaining legal advice, nor was the disclosure made in a judicial proceeding.³⁶ Further, the conduct arguably meets the "future crime or fraud" exception to the privilege.³⁷

³³ 425 U.S. 80 (1976).

³⁴ 422 U.S. 853 (1975); see also *Brooks v. Tennessee*, 406 U.S. 605 (1972) (statute requiring a defendant to take the stand, if at all, immediately after close of prosecution's case held unconstitutional on due process grounds because it deprives the defendant of the "guiding hand of counsel").

³⁵ J. WIGMORE, *supra* note 25, § 2292. There are, of course, different statements of the privilege that give broader or narrower protection to confidentiality. See *id.* § 2292 n.2 (statutory codifications of privilege); MODEL CODE OF EVIDENCE Rule 210 (1942).

³⁶ The privilege is a rule of evidence that prevents disclosure of confidential information in adversarial proceedings. See J. WIGMORE, *supra* note 25, § 2292 n.2 (statutory statements of privilege provide that privilege prevents attorney from testifying).

³⁷ J. WIGMORE, *supra* note 25, § 2298.

Such a disclosure rule would also not violate the privilege against self-incrimination.³⁸ In two recent cases, *Fisher v. United States*³⁹ and *Andresen v. Maryland*,⁴⁰ the Supreme Court dealt with the application of the privilege against self-incrimination to incriminating information obtained from lawyers. In *Fisher* the Court considered a situation in which a summons was issued by the Internal Revenue Service to a lawyer to obtain the client's accounting records that were in the lawyer's possession. In *Andresen* the Court dealt with a search pursuant to a warrant to obtain business records prepared by the client that were in the possession of the lawyer. *Andresen* was the more difficult case because the records contained statements voluntarily prepared by the client, while in *Fisher* the records were ministerial. In both cases the Court held that the privilege prevented compulsory disclosure of information from the defendant. Since the information in both cases came from the lawyers rather than the defendants, the element of compulsion was not present.⁴¹ These cases hold that a rule requiring a lawyer to disclose the intention of his client to commit a crime would not violate the privilege against self-incrimination because it would not force the client to do anything. Furthermore, it is doubtful whether the disclosure of the information would incriminate the client. Because the act has not yet been committed, the client would only be incriminated if the client's conduct prior to the disclosure amounted to an attempt.

A rule of ethics that required a lawyer to disclose the intention of a client to commit a wrongful act that would seriously harm another would also not violate the right to counsel. The attorney-client relationship is a matter of great public concern that the state has the power to regulate so long as it does not infringe fundamental rights, such as freedom of speech, freedom of association, and sixth amendment rights.⁴² A rule that required a lawyer to disclose the intention of a client to commit a wrongful act would not seem to touch on fundamental rights; neither would it implicate the sixth amendment since criminal proceedings would not have been instituted.⁴³

In summary, the justification that rules of strict confidentiality are necessary in order to protect the legal or constitutional rights of clients does not withstand analysis. In some limited situations, disclosure rules would violate constitutional rights, but in general, such rules would be constitutionally permissible.

2. *Historical Justifications*

A second argument in support of strict confidentiality is historical—that proposals to require or authorize disclosure of client confidences undermine the traditional attorney-client relationship and the traditional functioning of the ad-

³⁸ U.S. CONST. amend. V.

³⁹ 425 U.S. 391 (1976).

⁴⁰ 427 U.S. 463 (1976).

⁴¹ 427 U.S. at 472-74; 425 U.S. at 397.

⁴² Compare *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Johnson v. Avery*, 393 U.S. 483, 490 n.11 (1969).

⁴³ The right to counsel attaches at the initiation of adversary proceedings, either by formal charge, preliminary hearing, indictment, or arraignment. Compare *Kirby v. Illinois*, 406 U.S. 682 (1972) (no right to counsel at "showup" after arrest), with *Brewer v. Williams*, 430 U.S. 387 (1977) (right to counsel attaches at interrogation made after arraignment).

versarial system.⁴⁴ The historical argument, however, does not support the position of strict confidentiality. Rather, the historical evidence shows that the proper scope of the duty of confidentiality has always been a subject of considerable debate in the profession, with no clear consensus ever emerging. Under the Canons of Ethics, the predecessor to the Code of Professional Responsibility, the American Bar Association Committee on Professional Ethics and Grievances issued a number of contradictory opinions about the lawyer's duty of confidentiality when confronted with wrongful conduct by a client. In an early opinion, the Committee ruled that a lawyer should not disclose the whereabouts of a fugitive because the information was confidential, even though the information came from relatives rather than from the client.⁴⁵ In subsequent opinions, however, the Committee ruled that disclosure was required because the client was guilty of a continuing crime.⁴⁶ The Committee then retreated from this opinion when it held that a lawyer should not disclose information revealed by his client showing that perjury was committed in a divorce case.⁴⁷

Under the Code of Professional Responsibility, the oscillation between disclosure and confidentiality has continued rather than been resolved. As originally drafted, the Code of Professional Responsibility required a lawyer to reveal fraud committed by a client on either a person or a tribunal. Subsequently, however, the Code was amended to make the fraud disclosure provision subject to the requirements of confidentiality.⁴⁸

Similarly, evidence indicates that historically the scope of the evidentiary attorney-client privilege, which is founded on many of the same policy considerations as the ethical duty of confidentiality, has also been the subject of considerable doubt.⁴⁹ Indeed, the proper scope of the privilege remains the subject of litigation.⁵⁰ In short, the evidence simply does not support the claim that history favors a strict view of confidentiality.

3. Policy Considerations

The final justification for strict confidentiality is based on policy grounds. The policy argument can be stated in two different ways. One argument is that, even

⁴⁴ See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975) [hereinafter cited as M. FREEDMAN].

⁴⁵ ABA Comm. on Professional Ethics and Grievances, Formal Op. 23 (1930).

⁴⁶ ABA Comm. on Professional Ethics and Grievances, Formal Op. 155, 156 (1936).

⁴⁷ ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).

⁴⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1969) originally provided:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

In 1974, the Rule was amended to add the following language at the end of the Rule: "except when the information is protected as a privileged communication." In ABA Formal Opinion 341, the Committee on Ethics and Professional Responsibility ruled that the term "privileged communication" referred to both confidences (information protected by the attorney-client privilege under the law of evidence) and secrets under Disciplinary Rule 4-101. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The effect of this interpretation was to eliminate the requirement for disclosure of fraud.

⁴⁹ Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

⁵⁰ *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (holding that the attorney-client privilege extends beyond communications from the "control group" of a corporation to communications made by lower level employees).

though rules of strict confidentiality may not be necessary to protect the legal rights of clients, it is clear that such rules foster an important social purpose by facilitating communication between lawyers and clients. There are several difficulties with this argument. Numerous barriers already exist to frank communication between clients and lawyers. First, clients consciously or unconsciously may be unwilling to give their lawyers complete and truthful information for fear of harming themselves.⁵¹ Second, in some areas of practice, racial and social barriers may make frank communication unlikely.⁵² Last, trust probably cannot be developed through rules but rather requires a relationship over an extended period of time. In addition, even the staunchest proponent of confidentiality recognizes that confidentiality is qualified in some instances.⁵³ For these reasons, it is doubtful that the addition of carefully defined disclosure obligations would significantly impede communication. Finally, the argument for strict confidentiality has a hidden normative premise. The premise is that the policy of promoting frank communication between lawyers and clients is primary—that other interests are subordinate to the policy. Why should protection of the legal rights of a person who is about to be seriously harmed be subordinate to the more speculative policy benefits that accrue through confidentiality? It seems more reasonable to give priority to the avoidance of certain harm over speculative benefits.

The second version of the policy argument in favor of strict confidentiality is that disclosure obligations are unnecessary and, indeed in some cases, positively harmful. The obligations are unnecessary because in many instances there are institutional protections against the very evil that disclosure obligations are designed to prevent. The widely discussed problem of the intention of a criminal defendant to commit perjury provides an example. Disclosure of perjury, it is argued, is unnecessary because independent finders of fact, as well as the state's powerful weapon of cross-examination, already exist to expose perjury.⁵⁴

This argument does not justify strict confidentiality. While disclosure may sometimes be unnecessary because of the existence of institutional protections against the harm that disclosure would prevent, it is also true that there are some situations in which such institutional protection is nonexistent or inadequate. The case of the client who expresses the intention to kill another person provides an example. The police constitute a societal institution designed to prevent criminal conduct. Yet, it is highly unlikely that the police could prevent such a crime from occurring. Unless the lawyer discloses the client's intention, the harm will occur and cannot be rectified. Similarly, if a drug manufacturer continues to market a product that it knows has serious problems, disclosure may be necessary to prevent the harm even though an institution, such as the Food and Drug Administration, exists to deal with such problems. Such institutions do not have unlimited resources nor do they have complete information.

The other version of the "lack of necessity" policy argument is that disclosure

⁵¹ Burt, *supra* note 26, at 1019-20.

⁵² G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 220 n.25 (1978).

⁵³ Alternative B of the ATLA Code, which has the strictest rules of confidentiality, provides for disclosure in two situations. See *supra* note 12.

⁵⁴ See ATLA Code, *supra* note 11, Rule 1 comment; Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425, 474-75 (1978) (arguing that lawyers should have a confidential rather than an autonomous role because the accounting profession has public responsibilities).

obligations about wrongful conduct are positively harmful because they increase the amount of harm from client conduct rather than reducing it. If lawyers have the obligation to disclose wrongful conduct by their clients, clients will tend not to consult lawyers about such conduct, and, as a consequence, lawyers will receive less information about proposed wrongful conduct. On the assumption that most lawyers tend to follow the law and will advise their clients to do so, wrongful conduct would be decreased if clients have an incentive to consult with their lawyers and thereby receive advice to follow the law.⁵⁵ This argument also does not withstand analysis. First, as noted above, there are a variety of barriers to trust between lawyers and clients.⁵⁶ Thus, it seems unlikely that the mere existence of a rule of confidentiality would do much to increase the extent to which clients would be willing to discuss wrongful conduct with their lawyers. Indeed, there is some evidence that indicates that clients who are engaged in illegal conduct scrupulously avoid letting their lawyers know about their actions.⁵⁷ Second, a hypothetical analysis of the probable behavior of lawyers and clients is illuminating.

The clients or potential clients who might be affected by a disclosure rule may be divided into four categories: (1) Some (the noncounselors) would not seek the advice of lawyers regardless of whether rules required disclosure or confidentiality. The typical bank robber, for example, would not seek a lawyer's advice before robbing a bank because the advice he might receive would not be important to him. (2) Others (the criminally inclined) are committed to a course of conduct before employing lawyers. Such clients cannot be dissuaded from their plans. They seek legal representation, not for advice about the desirability or legality of their conduct, but in order to have their lawyers handle the legal details of the transactions and perhaps minimize the risks that they face from engaging in illegal conduct. (3) Others (the persuaded clients) are committed to a course of conduct before they retain lawyers, but are convinced not to engage in such conduct because their lawyers are able to point out considerations of which the clients were unaware. (4) Finally, some clients (the advice seekers) are uncertain about the course of conduct that they wish to pursue. Such clients seek legal advice in order to reach a decision.

Analysis of the impact of a rule of confidentiality on these categories of clients shows that such a rule would probably not lead to a greater reduction of harm when compared with a disclosure rule. The amount of harm done by noncounselors remains the same regardless of the choice of rule. For the criminally inclined, a disclosure rule would tend to reduce the harm to a greater extent than a rule of confidentiality. Counseling does not change the plans of such clients, while disclosure prevents some harm from occurring. The consequence of a disclosure rule, of course, would be to discourage such clients from consulting lawyers. Even this would seem to tend to reduce the amount of harm, however, because it would make it more difficult for such clients to obtain the advice

⁵⁵ This is an argument made by the drafters of the Model Rules. ABA Proposed Final Draft, *supra* note 13, Rule 1.6 comment "Disclosure Adverse to Client." The position of the Model Rules seems inconsistent with the argument. If the drafters truly believe that more harm is prevented through consultation than by disclosure, and that confidentiality promotes consultation, they should have adopted a strict view of confidentiality.

⁵⁶ See *supra* notes 51, 52 and accompanying text.

⁵⁷ Burt, *supra* note 26, at 1028 n.62.

needed to carry out their illegal schemes. In contrast, it is clear that a rule of confidentiality would reduce the harm that is done by persuaded clients. Without the rule, such clients would be discouraged from seeking advice. With the rule, they are encouraged to seek advice, and if they do so their plans are changed by counseling.

The effect of a disclosure rule on advice seekers is uncertain, but probably more harm is prevented by a disclosure rule than a rule of confidentiality. On the one hand, a rule that requires disclosure would tend to reduce the amount of harm caused by those clients who consult lawyers, obtain advice about their conduct, are informed that their conduct is clearly wrongful, but decide to engage in such conduct regardless of the advice they receive. On the other hand, a disclosure rule might tend to increase the amount of harm that occurs because the rule might discourage some clients from obtaining legal advice. Without legal assistance, some clients might engage in wrongful conduct, even though, had they had the advice of a lawyer, they would have been persuaded not to do so. It does seem, however, that the extent to which advice seekers will be dissuaded from obtaining the assistance of a lawyer by a disclosure rule is likely to be small. Advice seekers have an incentive to seek legal advice in order to make a decision. Further, because advice seekers do not have a fixed intention to act regardless of the advice they receive, it is unlikely that they would think of the disclosure rule as applying to them—they would not think of themselves as intentional wrongdoers. The following chart summarizes the conclusions of the effect of a rule of confidentiality on the amount of harm to others.

<u>Type of Client</u>	<u>Effect of Rule of Confidentiality on Amount of Harm</u>
Noncounselors	No effect
Criminally Inclined	Harm increased
Persuaded Clients	Harm decreased
Advice Seekers	Conflicting effects on harm, but probably increased

The consequences of a rule of confidentiality on the amount of harm done by clients are, of course, impossible to determine without empirical evidence as to the relative number of clients in each category and the types of harm done. Of the four categories, it seems intuitively likely that the number of persuaded clients will be small. Probably few clients enter the relationship with their lawyer with a fixed plan of action. Rather, the vast majority of clients probably are advice seekers. Based on the assumption that the number of persuaded clients is likely to be small, the analysis leads to the conclusion that a rule of ethics that requires disclosure of intentionally wrongful conduct is more likely to reduce the amount of overall harm from such conduct than a rule that requires strict confidentiality.

In summary, the foregoing analysis indicates that the more limited approach to confidentiality reflected in the Model Rules is sounder than the approach of strict confidentiality contained in the ATLA Code. The analysis leaves unan-

swered, however, the question of when there should be exceptions to confidentiality beyond legal requirements.

D. Disclosure Beyond Situations Required by Law: Protection of the Interests of Clients and Avoidance of Serious Violations of Law or Legal Rights

Because the duty of confidentiality exists to protect the interests of clients, it is clear that disclosure should be permitted when it is in the client's interest. If a client, after being fully advised by his lawyer of the consequences, consents to disclosure, it is obviously appropriate for the lawyer to do so. The client has in essence waived his interest in confidentiality. Further, there may be instances in which disclosure would be in the interest of the client but the client is unavailable or unable to consent. In such cases, it also seems appropriate to provide for disclosure.

The more difficult disclosure situations involve conflicts between client interests in confidentiality and the interests of other persons, the system of justice, and lawyers themselves in being free of harm that results from client conduct.⁵⁸ As the analysis of the preceding section indicates, strict confidentiality is not a desirable solution to this conflict. Similarly, the opposite extreme solution of disclosure to prevent any harm to others would be inappropriate. Such a solution gives inadequate weight to the client interest in confidentiality. Thus, it is clear that a balance must be struck.⁵⁹ This conclusion, however, leaves unanswered the more difficult question of how to strike the balance.

One approach for doing so would be to provide lawyers with professional discretion to reveal confidential information when they thought it was appropriate in order to protect other interests from harm. Such an approach is undesirable, however, for several reasons. First, because of personal relationships as well as financial incentives, lawyers have a natural tendency to favor the interests of clients over other interests.⁶⁰ As a consequence a rule that gives lawyers discretion to reveal confidential information is likely to result de facto in a rule of confidentiality. Second, even if some lawyers did exercise their discretion to reveal confidential information it would create a problem of unequal treatment among clients. Third, the discretionary approach places the burden of making difficult decisions on lawyers who often must act under considerable time and personal pressure. Such circumstances are not conducive to enlightened decision-making. Thus, it seems that the balance between the competing interests should be struck by the drafting of rules rather than by providing discretion to lawyers.

⁵⁸ See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705-06 (1977) (use of interest analysis in critique of Code of Professional Responsibility).

⁵⁹ It might be objected that this balancing of interests implicitly views rules of confidentiality from a social utilitarian perspective while it ignores the dimension of individual rights. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). There are two responses to this objection. First, rules of confidentiality must embody legal requirements. See *supra* notes 27-32 and accompanying text. If a rule would violate a legal right of a client, disclosure would not be appropriate. Thus, the balancing approach only occurs in situations in which disclosure would not violate client rights. The approach, in other words, assumes a protection of rights. Second, even under the principle of balancing, disclosure is only permissible when the harm to other interests clearly outweighs harm to confidentiality. This presumption in favor of confidentiality protects an aspect of individual rights. See *supra* notes 24-26 and accompanying text.

⁶⁰ See Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978).

Analysis indicates several considerations that should be taken into account in drafting such rules.

First, disclosure of confidential information is not always permissible merely to avoid harm to other interests, even serious harm. Consider the example of a lawyer who represents a manufacturer of a product. Over the last few years, the manufacturer has learned of accidents involving the product that have resulted in serious injury and, in some cases, death. The manufacturer has done an extensive redesign study and has identified several redesign options. The safest of these would reduce the probability of death or serious injury from the use of the product almost to zero, but the redesign would increase the cost of the product by ten percent. Another option could be adopted at a minimal cost, but expert opinion is that a certain number of deaths per year can be expected from the use of the product. The company has decided to choose the second option. Consumers have the legal right to be free of conduct by manufacturers that produces defective products that are unreasonably dangerous.⁶¹ On the other hand, manufacturers have the right to market products that have reasonable risks associated with them.⁶² Thus, while harm will result to a statistically determinable number of consumers in the example, the harm may be justified. The principle of providing for disclosure to avoid harm to other interests must be narrowed to particular types of harm—to harm that constitutes either a violation of law or of another's legal rights.

Even if client conduct involves a violation of law or the legal rights of another person, disclosure is not always appropriate. Consider the following example: While client is at an appointment in lawyer's office, he excuses himself a moment, telling the lawyer that he is about to place a second quarter in the meter at which he is parked. This is a misdemeanor. Lawyer tells him so and suggests that he not do it. Client laughs and leaves to feed the meter.⁶³ This situation, while involving a violation of criminal law, is not appropriate for disclosure because the harm that would be avoided by disclosure is too insubstantial. Disclosure is only warranted when the harm is serious. Death, bodily injury that is partially or totally disabling, or significant harm to property or financial interests all seem to constitute serious harm to another person. It seems reasonable to evaluate the seriousness of the harm from the point of view of the person harmed. A \$100,000 loss may be insignificant to a multi-billion dollar corporation but disastrous to an individual. Similarly, bribery of a judge seems to be a serious harm to the system of justice.

Not all cases of serious harm to the legal rights of others or to the system of justice warrant disclosure. Consider the following example: An antidiscrimination law guaranteeing women equal access to places of public accommodation has recently been passed in lawyer's city. Client has, for the past twenty-five years, operated a "men only" bar in the business district. Fearing the loss of distinctiveness with a consequent loss of business, he tells lawyer that he is going to take active steps to discourage patronage by women. He is going to encourage his regular customers to help him, but states that he will not condone violence of

⁶¹ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶² *Id.* comments i, k.

⁶³ This example is taken from A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 113 (1975).

any sort. His activities violate the statute and clearly constitute criminal conduct. Client says that he is going to take his chances and disregard lawyer's advice to obey the law.⁶⁴ In this situation, the client intends to engage in conduct that violates the legal rights of women in the city. Yet, the client's conduct will be known to the public. Presumably some women will become aware of it and can take legal steps to protect their rights. While the lawyer's disclosure might focus attention on the conduct and result in a prompter response to it, this does not seem to be a sufficiently important interest to warrant disclosure. Thus, there are some cases in which disclosure does not seem to be necessary to avoid harm because those who are harmed are in a position to protect themselves. While it will often be difficult to determine when disclosure is necessary, a key factor, as the example shows, is the extent to which the harm is known to interested parties. To the extent the harm is known disclosure will generally be unnecessary.

In summary, the analysis indicates that rules of ethics should provide for disclosure of confidential information under certain circumstances even though the law does not impose a duty on the lawyer to do so. Disclosure is appropriate if it is reasonably necessary to avoid a serious harm to the legal rights of another person or a violation of law that seriously harms the system of justice.

E. The Principle of Optimum Clarity in Drafting

Rules of ethics serve several important purposes. First, the rules provide guidance to lawyers as to how they should behave. Second, they provide standards for the discipline of lawyers. Last, they provide a source of public information about the kind of behavior that can be expected from lawyers.⁶⁵ To accomplish these goals effectively, rules of ethics must avoid the twin evils of excessive generality and specificity. If the rules are too general they will not provide adequate guidance. Conversely, if the rules are too detailed, as, for example, is the Internal Revenue Code, they become inaccessible to the average lawyer. Thus, the rules must strive for what could be called the optimum level of clarity: specific enough to provide guidance but not so specific as to require special expertise in order to be understood.⁶⁶

Implementation of the principle that rules of ethics should require lawyers to disclose information when required by law provides an example of how optimum clarity can be achieved. The rules should not stop with a mere statement that lawyers should disclose confidential information "when required by law" because it provides inadequate guidance. Instead, if analysis of relevant law indicates that it is possible to state a clear rule, then the rules of ethics should do so.

III. A CRITICAL ANALYSIS OF THE PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT

The Model Rules adopt an interest analysis approach to confidentiality problems. Some rules deal with the problem of confidentiality when the interests

⁶⁴ *Id.*

⁶⁵ ATLA Code, *supra* note 11, at 48 (Preamble).

⁶⁶ Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 A.B.F. RES. J. 1016, 1019.

of clients conflict with the interests of others;⁶⁷ some rules deal with problems that arise when the interests of clients conflict with social interests;⁶⁸ and, finally, some rules deal with conflicts between client interests and the interests of lawyers.⁶⁹

A. Disclosure to Protect the Interests of Third Persons

1. Wrongful Client Conduct: Model Rule 1.6

Proposed Model Rule 1.6(b)(2) provides that a lawyer may reveal confidential information to the extent the lawyer believes necessary "[t]o prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another." Model Rule 1.6(b)(3) provides that a lawyer may reveal confidential information "[t]o rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."

These disclosure provisions are clearly based on the principle of avoidance of serious harm to others. Yet, the Rules seem to create distinctions that would preclude disclosure in situations that involve serious harm to the legal rights of others.

Model Rule 1.6(b)(2) does not provide for disclosure of wrongful conduct that is neither criminal nor fraudulent, even if such conduct would result in serious harm to the legal rights of others. Consider the situation of a lawyer who represents an automobile manufacturer. Suppose the manufacturer discovers that a class of vehicles that has been sold to the public contains a serious defect, such as the difficulties with the gas tank in the Ford Pinto. It is doubtful that a lawyer would be authorized to disclose this information under Model Rule 1.6(b)(2) because it is probable that the manufacturer's conduct constitutes neither a crime nor fraud.

Under federal law, manufacturers of motor vehicles have an obligation to comply with federal safety standards.⁷⁰ If a manufacturer discovers that a vehicle does not comply with those standards, it has a statutory obligation to notify purchasers.⁷¹ Nothing in the statute, however, makes a failure to notify a criminal act. The Secretary of Transportation is authorized to bring a proceeding to collect a civil penalty or enjoin violation.⁷² Criminal penalties only attach, however, when the manufacturer has been held in criminal contempt for violation of an injunction or restraining order.⁷³ For products that are not as strictly regulated as automobiles, it is very unlikely that a manufacturer's failure to disclose a defect in the product would constitute a crime.

Similarly, the failure to disclose would not constitute a "fraudulent act." The

⁶⁷ ABA Proposed Final Draft, *supra* note 13, Rule 1.6(b)(2), (b)(3) (discretionary disclosure when client engages in conduct harmful to others).

⁶⁸ *Id.* Rule 3.3 (duty of candor to tribunal includes an obligation to disclose confidential information to prevent fraud or perjury).

⁶⁹ *Id.* Rule 1.6(b)(4) (discretion to disclose confidential information in order to collect a fee or defend charges of wrongdoing based on conduct in which the client was involved).

⁷⁰ National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1397 (1976).

⁷¹ *Id.* § 1411.

⁷² *Id.* §§ 1398, 1399.

⁷³ *Id.* § 1399(b).

definitional section of the Model Rules provides that a fraudulent act is "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."⁷⁴

If the policy behind the rule that gives lawyers discretion to reveal confidential information is to avoid serious harm to the legal rights of others, it is difficult to see why the rule is limited to conduct that is criminal or fraudulent. One possible response is that the Rule was drafted to ensure consistency between the ethical duty of confidentiality and the attorney-client evidentiary privilege. As generally stated, the attorney-client privilege has an exception for criminal or fraudulent conduct, but not for conduct that is merely tortious. For example, Proposed Federal Rule of Evidence 503, which is widely cited as a statement of the attorney-client privilege, contains an exception for criminal or fraudulent conduct. Similarly, Wigmore concludes that the case law has generally limited the exception to the privilege to conduct that is criminal or fraudulent.⁷⁵

This justification for limiting the scope of disclosure under Rule 1.6(b)(2) is unsatisfactory for several reasons. First, although it may be true that the case law generally supports the proposition that the exception to the attorney-client evidentiary privilege is limited to criminal or fraudulent conduct, this view has been criticized. While acknowledging that the cases generally limit the exception to criminal or fraudulent conduct, Wigmore states: "Yet it is difficult to see how any moral line can properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be."⁷⁶ Indeed, the American Law Institute's Model Code of Evidence provides for an exception to the privilege when legal advice was sought or obtained to enable the client to commit a crime or tort.⁷⁷ Thus, even if the drafters wished to promote consistency with the evidentiary privilege, there is authority that supports exceptions for wrongful conduct that is neither criminal nor fraudulent.

Second, there is no sound reason why exceptions to the duty of confidentiality should be the same as exceptions to the evidentiary attorney-client privilege. The policy reasons for the ethical duty of confidentiality and the privilege are the same—to promote open and frank communication between lawyers and clients.⁷⁸ The exceptions, however, serve different purposes. Exceptions to the evidentiary privilege are justified in the interest of truthful resolution of adversarial proceedings. Exceptions to the duty of confidentiality, on the other hand, are based on the policy of prevention of serious harm to others. While truth in the judicial process is certainly an important social policy, prevention of serious harm to others seems intuitively to be more important. Thus, it would be reasonable to have a broader exception to the duty of confidentiality than to the evidentiary privilege.

A second difficulty with the Model Rule is that it limits the discretion to make disclosure to conduct that involves serious bodily harm or property damage. There may be cases of serious harm to others that do not involve either of these

⁷⁴ ABA Proposed Final Draft, *supra* note 13, at 5 (Terminology).

⁷⁵ J. WIGMORE, *supra* note 25, § 2298 and n.1.

⁷⁶ *Id.* § 2298.

⁷⁷ MODEL CODE OF EVIDENCE Rule 212 (1942).

⁷⁸ See *supra* note 25.

types of harm. Suppose, for example, a lawyer represents a husband in a divorce case in which custody of a minor child is a major issue. The husband tells the lawyer that he plans to leave the jurisdiction, taking the child with him. Under the Rule, it seems unlikely that the lawyer would be authorized to make disclosure in this situation because the client's conduct does not involve death, substantial bodily harm, or substantial injury to the financial interest or property of another person.

The Model Rule gives lawyers discretion to reveal confidential information in order to prevent conduct that involves serious harm to others rather than imposing a duty on lawyers to do so. The comments argue that discretion is justified because it is often difficult for a lawyer to know if a client will carry out a proposed wrongful scheme. The drafters argue that "[t]o require disclosure when the client intends such an act, at risk of disciplinary liability if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma."⁷⁹

There are difficulties, however, with this justification. Other provisions of the Rules require a lawyer to take action even though it may be difficult for the lawyer to "know" whether the client will act wrongfully. The Rules require a lawyer to refuse to offer evidence that the lawyer knows is false.⁸⁰ Thus, a lawyer must refuse to put a witness on the stand if the lawyer knows that the witness is going to commit perjury, even though this determination may be a difficult one to make.⁸¹ Further, as discussed above, discretion creates the problems of de facto confidentiality, unequal treatment, and inadequate guidance.⁸²

On the other hand, as a matter of political reality, it is clear that the profession would strongly resist mandatory disclosure obligations. If the Commission were to present such a rule, it is highly unlikely that it would be adopted by the ABA, and even less likely that it would receive widespread support in the states. For political reasons, therefore, the Commission's decision to adopt a rule of discretion is understandable, although the policy reasons seem to support a rule that requires disclosure.

The analysis, thus, indicates that modification of Model Rule 1.6(b)(2) is warranted. The following is a suggested revision:

. . . to prevent the client from committing an act that is likely to result in a serious violation of the legal rights of another person.

Model Rule 1.6(b)(3) provides a lawyer with discretion to reveal confidential information to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used. The requirement that the lawyer's services be used in the commission of the act creates distinctions that do not seem sound when considered in light of the policy of harm prevention. Consider the following two examples: (1) A lawyer represents a defendant who is accused of burglary. During the course of representation, the client informs the lawyer that he has committed several murders for which another per-

⁷⁹ ABA Proposed Final Draft, *supra* note 13, Rule 1.6 comment "Disclosure Adverse to Client."

⁸⁰ *Id.* Rule 3.3(a)(4).

⁸¹ *Id.* Rule 3.3 comment "Perjury by a Criminal Defendant."

⁸² *See supra* text accompanying note 60.

son has been convicted. That individual has been sentenced to death and awaits execution. (2) A lawyer represents a group of syndicators who wish to sell interests in a limited partnership that will invest in land. The lawyer advises the clients that the interests constitute securities under federal law and that certain requirements must be met in order to avoid registration. The lawyer prepares the necessary documents and informs the clients of the legal steps they must take to avoid registration. Some time later, the lawyer learns that clients sold securities on numerous occasions in violation of the requirements for exemption. Under the Model Rule, disclosure would be appropriate in the securities fraud case but not in the burglary case. Yet, this result seems intuitively unsound. The execution of an innocent person is surely a more serious harm than securities fraud.

A rule of ethics that deals with past wrongful conduct that has continuing ramifications should take into account two policies. First, the rule should encourage clients who have committed wrongful acts but who wish to rectify them to seek legal advice and redress their wrongs. This policy precludes a rule that would require lawyers to disclose all on-going wrongful conduct of which they become aware. Second, serious harm, like that involved in the burglary example, should be prevented. The following proposed revision of Model Rule 1.6(b)(3) seems to take into account these two policies:

. . . to rectify a serious violation of the legal rights of another person, unless the lawyer has been employed by the client to represent the client in efforts to rectify the violation of rights or unless the lawyer has been employed by the client to defend the client against charges based on the violation of those rights.⁸³

2. *Misrepresentation by Lawyers: Model Rule 4.1*

Concern for the interests of third persons is also reflected in Model Rule 4.1, which deals with the obligation of lawyers to be truthful in transactions with others. The Rule prohibits lawyers from making false statements of either fact or law. Further, the Rule requires lawyers to disclose facts if the failure to disclose would be equivalent to making a material misrepresentation, if disclosure is necessary to prevent the lawyer's assistance in the commission of a criminal or fraudulent act, or if otherwise required by law.

The prohibition against misrepresentation found in the Rule is sound. The obligation to avoid misrepresentation is a well-established legal duty and is supported by policy. Lawyers should be no more free to engage in misrepresentation than any other person. A variety of statements made in the course of negotiations by lawyers, however, such as statements about authority to settle, are not treated by the participants in the negotiation as fraudulent.⁸⁴ While the comments to the Rule refer to this concept, the Rule itself does not.⁸⁵ The Rule

⁸³ The second qualification is implicit in the requirement that disclosure must be necessary to rectify the consequences of the act. If the lawyer is defending the client against charges, disclosure of the client's wrong is not needed to rectify the act because the wrong has been exposed. However, it is desirable to make the qualification explicit to avoid any confusion.

⁸⁴ White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 A.B.F. RES. J. 926, 931-34.

⁸⁵ ABA Proposed Final Draft, *supra* note 13, Rule 4.1 comment "Statements of Fact."

should be redrafted to make it clear that such "puffing" statements are not improper.

The Rule provides that a lawyer shall disclose a fact when failure to disclose would amount to a material misrepresentation. To many lawyers, this requirement will be unclear. The Rule could be improved, however, by reference to the case law and the Restatement of Torts, which establish two situations in which a failure to disclose amounts to a material misrepresentation. First, if a lawyer has made a representation that the lawyer later learns is false, the lawyer has a duty to disclose the material facts resulting in falsity, even if the original representation was true when made. For example, in *Henningan v. Harris County*⁸⁶ a lawyer represented a plaintiff in a divorce action. The trial court entered judgment for the plaintiff, including an award of attorney's fees to the lawyer. The lawyer subsequently obtained a writ of execution against the plaintiff's former husband to enforce the fee award. When the writ expired after the constable failed to enforce it, the lawyer brought suit against the constable and his surety. At a hearing, the court stated it would enter judgment against the constable and the surety. Between the date of this hearing and the signing of the order, the husband paid the fees in full. The lawyer presented the order to the judge for his signature even though the lawyer knew the fee had been paid. The constable appealed this judgment, which was affirmed. Subsequently, the constable discovered that the husband had paid the fees in full and brought suit against the lawyer for the expenses incurred in prosecuting the appeal. The trial court granted judgment for the constable and the county, holding that the lawyer's conduct amounted to fraudulent concealment. Similarly, a duty to disclose can be found in the Restatement of Torts, which provides that a person has a duty to disclose "subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so"⁸⁷

Second, a lawyer has a duty to disclose material facts if the disclosure is necessary to prevent statements made by the lawyer from being materially misleading. In other words, if a lawyer speaks, he may not make misleading statements. The case of *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*⁸⁸ illustrates this principle. The defendant attorneys had issued an opinion letter stating that an organization was a general partnership. The opinion letter failed to disclose facts known to the lawyers that cast doubt on whether the organization was a general partnership. The court held that the plaintiff, who had relied on the opinion in making loans, stated a cause of action against the attorneys for misrepresentation. The court stated that "[e]ven though defendants may have believed that there was a general partnership in spite of the claims of some of the general partners, the firm had a duty to reveal to plaintiff this doubt as to the status of the partnership Half the truth is often as misleading as outright falsehood."⁸⁹ Similarly, the Restatement of Torts adopts the view that a person has a duty not to make

⁸⁶ 593 S.W.2d 380 (Tex. Civ. App. 1979); see also *Toledo Bar Ass'n v. Fell*, 51 Ohio St. 2d 33, 364 N.E.2d 872 (1977) (lawyer disciplined for failure to reveal to a workmen's compensation board that his client had died when the lawyer knew that the board regularly denied disability benefits in such cases).

⁸⁷ RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1976).

⁸⁸ 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

⁸⁹ *Id.* at 111, 128 Cal. Rptr. at 906.

partially true statements. The Restatement provides that a person has a duty to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading."⁹⁰

Rule 4.1 is also deficient in that it omits an important situation in which lawyers have a duty to disclose facts. A lawyer has a duty to disclose material information if there is a fiduciary relationship with another person. The normal case of a fiduciary relationship is one in which the lawyer represents multiple clients. The case of *Rogers v. Robson, Masters, Ryan, Brumund & Belom*⁹¹ illustrates this duty of disclosure. The *Rogers* case arose from a law firm's representation of a defendant doctor and his insurer in a medical malpractice case. Although the insurance policy involved provided that the insurer could settle the claim without the consent of the doctor, the doctor had informed the company and the lawyer that he did not want to settle the claim on any terms. The company received a settlement offer of \$1,250 and directed the law firm to effectuate the settlement, which it did. The doctor then sued the law firm. The appellate court affirmed the decision of the trial court to deny the law firm's motion for summary judgment, holding that the firm had a duty to inform the doctor of the insurer's intent to settle the case without his consent. The court held that this duty stemmed from the attorney-client relationship and was unaffected by the insurance company's authority to settle. Similarly, the Restatement of Torts provides that a person has a duty to disclose "matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."⁹²

Rule 4.1 provides for disclosure when otherwise required by law. The clarity of this provision could be improved in two ways. First, the Rule should provide a standard to guide lawyers when their legal obligations to make disclosures are uncertain. As discussed above, the appropriate standard is that a lawyer should be required to disclose when the violation of law is "likely." Second, the Rule could more clearly specify what is meant by the concept of a legal requirement to make disclosure.⁹³

In the absence of a specific duty to disclose material information, lawyers generally do not have an obligation to disclose such information to third persons. The case of *National Automobile Casualty Insurance Co. v. Atkins* is illustrative.⁹⁴ In that case the defendant lawyers had represented an individual in an action on certain claims against Columbia News. The lawyers obtained an attachment bond from National in connection with a levy on the bank accounts owned by Columbia. Subsequently, the action against Columbia was dismissed and Columbia recovered from National on its bond. National bought suit against the lawyers, claiming negligence in failure to prosecute the claim against Columbia promptly, and a breach of duty in the failure of the lawyers to disclose the death of the plaintiff in the action against Columbia that prevented National from filing a claim in probate proceedings. The court reversed a trial court judgment

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1976).

⁹¹ 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

⁹² RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976).

⁹³ See *supra* text accompanying notes 28-32.

⁹⁴ 45 Cal. App. 3d 562, 119 Cal. Rptr. 618 (1975); see also *Brian v. Christensen*, 35 Cal. App. 3d 377, 110 Cal. Rptr. 688 (1973).

for National, holding that the lawyers had no duty to advise creditors of the pendency of probate proceedings. The court stated that the statutory method of giving notice was all that the law required. Similarly, the Restatement of Torts adopts the view that in the absence of a specific duty, there is no general obligation to disclose material information to a third person.⁹⁵ It would seem desirable to make this general principle explicit in Rule 4.1.

The following is a proposed revision of Rule 4.1 that reflects these criticisms:

Rule 4.1 *Truthfulness in Statements to Others.*

In the course of representing a client, a lawyer shall not:

- (a) knowingly make a false statement of fact or law to a third person that the lawyer would reasonably expect to be relied on;
- (b) knowingly fail to disclose a material fact to a third person when:
 - (1) disclosure is necessary to correct a statement of material fact made by the lawyer which the lawyer later learns is untrue, regardless of whether the statement was true when made;
 - (2) disclosure is necessary to prevent a statement that is literally true from being so incomplete that it is misleading;
 - (3) the lawyer has a fiduciary or similar relationship of trust and confidence with the third person;
 - (4) failure to disclose is likely to constitute a crime, expose the lawyer to civil liability, or violate a court or administrative order or rule.
- (c) unless required above, a lawyer shall not disclose material information to a third person.

B. Disclosure to Protect the System of Justice

1. Perjury: Model Rule 3.3

Model Rule 3.3 deals with a lawyer's ethical obligation of candor toward a tribunal. The Rule contains several provisions that require disclosure of confidential information. First, the Rule provides that a lawyer shall not fail to disclose a fact when the failure to make disclosure is equivalent to the making of a material misrepresentation. Second, a lawyer is required to disclose a fact if the disclosure is necessary to prevent fraud on a tribunal. Third, the Rule prohibits a lawyer from offering evidence that the lawyer knows is false, and requires a lawyer who discovers that false evidence has been offered to take reasonable remedial steps, which will normally include disclosure of the falsity. The Rule omits a provision that was found in the Discussion Draft that allows a lawyer to disclose evidence favorable to the opposing side.⁹⁶

As the drafters point out, probably the most controversial issue in the debate over the duty of confidentiality has been the question of how a lawyer should respond when a criminal defendant insists on taking the stand to testify in a way that the lawyer knows is perjurious.⁹⁷ One solution to the problem, which has been advocated by Professor Freedman and is contained in the ATLA Code, requires the lawyer to continue to represent the defendant in the normal fashion, even arguing the perjured testimony to the finder of fact.⁹⁸ Another approach,

⁹⁵ RESTATEMENT (SECOND) OF TORTS § 551(1) (1976).

⁹⁶ Discussion Draft, *supra* note 6, Rule 3.1(e).

⁹⁷ ABA Proposed Final Draft, *supra* note 13, Rule 3.3 comment "Perjury by a Criminal Defendant."

⁹⁸ M. FREEDMAN, *supra* note 44, at 27-41; ATLA Code, *supra* note 11, Illustrative Cases 1(i), (j).

which has been recommended in a proposed American Bar Association Standard for the Defense Function,⁹⁹ provides that if a defendant insists on taking the stand to testify perjurally, his lawyer must withdraw from the case if that is

⁹⁹ A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Defense Function Standard § 7.7 (Approved Draft 1971), which provides as follows:

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

In 1979, the ABA Standing Committee on Association Standards for Criminal Justice proposed a revised section 7.7. The revised section made withdrawal permissive rather than mandatory and allowed lawyers to examine the defendant to the extent that such examination would not elicit perjurious testimony. The proposed changes addressed the concern that the procedure provided for by the rule was tantamount to an announcement of the perjury to the finder of fact and might even be unconstitutional. *See Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (a defendant was denied due process when his counsel moved to withdraw in a nonjury case because of proposed perjury). The Committee withdrew the proposed revision before the ABA's mid-year meeting in 1979 because the matter was under consideration by the Kutak Commission. 65 A.B.A. J. 336 (1979). The proposed revision is as follows:

(a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjurally.

(b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjurally, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjurally in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of the facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

In May 1980, the ABA Section on Criminal Justice proposed further liberalization of Standard 7.7. Under the proposal a lawyer who represents a client who insists on taking the stand to testify perjurally may not (a) assist the client in preparing the testimony; (b) assist the client in testifying except to the extent necessary to avoid revealing to the fact finder the lawyer's knowledge that the testimony is false; (c) refer to the testimony in argument except to the extent necessary to avoid revealing the knowledge of the perjury and (d) offer any evidence in support of the perjury. Letter from James G. Exum, Jr., Chairperson, Committee on Ethical Considerations in the Prosecution and Defense of Criminal Cases, to Robert J. Kutak (June 26, 1980).

feasible, obtaining leave of the court if necessary. If withdrawal is not feasible, or is denied, or if the matter arises at trial, the Standard provides that a lawyer shall not aid or use the perjured testimony. The lawyer should make a record that the defendant is testifying against his advice in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement. The lawyer may not argue the false version of the facts to the jury or rely on the false testimony in closing arguments.

The Model Rules reject both of these solutions. Under the Rules, a lawyer is required to refuse to offer false evidence.¹⁰⁰ The comments state that a lawyer is required to urge a client not to commit perjury, and if the client insists on doing so, the lawyer must reveal the perjury to the tribunal.¹⁰¹ The Rule has a caveat which states that the Rule may be superseded by decisions dealing with the constitutional rights of criminal defendants. The comments offer two justifications for this approach. First, it is claimed that a duty to disclose perjury is the general rule.¹⁰² Second, the comments state that the duty of disclosure is necessary in order to promote the social interest in truthful resolution of adversarial proceedings.¹⁰³

The drafters are incorrect in their claim that the majority of the cases support the proposition that a lawyer who represents a criminal defendant who intends to commit perjury has a duty to disclose the fact to the tribunal. Two cases indicate that such duty may exist, but neither of these cases considered the alternative approach found in ABA Standard 7.7. In *McKissick v. United States*,¹⁰⁴ a case decided before the proposed standard was drafted, a criminal defendant informed his lawyer during the middle of the trial that he had committed perjury. The lawyer informed the judge and made a motion for mistrial, which was granted. On appeal, the defendant claimed the lawyer's conduct violated his constitutional rights. The court held that a lawyer has a duty to report perjury to a court but remanded the case on the ground that the motion for mistrial violated the defendant's rights unless the defendant consented or unless the state could show that the motion was not prejudicial beyond a reasonable doubt.¹⁰⁵ In *People v. Lewis*¹⁰⁶ the court held that the defendant was not denied effective assistance of counsel because his lawyer made statements to the court that the defendant was competent to stand trial when the lawyer knew that the defendant was competent and that the defendant's statements on the stand were merely an attempt to deceive the trier of fact. The court held that the lawyer had an ethical responsibility to disclose the facts as he knew them.¹⁰⁷ The court's discussion of the ethical problem faced by the lawyer for a criminal defendant who commits perjury was cursory, however, and does not even mention the proposed ABA Standard.

¹⁰⁰ ABA Proposed Final Draft, *supra* note 13, Rule 3.3(a)(4).

¹⁰¹ *Id.* rule 3.3 comment "Perjury by a Criminal Defendant."

¹⁰² *Id.* comment "Constitutional Requirements."

¹⁰³ *Id.* comment "False or Fabricated Evidence."

¹⁰⁴ 379 F.2d 754 (5th Cir. 1967).

¹⁰⁵ *Id.* at 762. In subsequent proceedings, the court affirmed the lower court's decision that the motion for mistrial was beyond a reasonable doubt not prejudicial to the defendant. *McKissick v. United States*, 398 F.2d 342, 343 (5th Cir. 1968).

¹⁰⁶ 75 Ill. App. 3d 560, 393 N.E.2d 1380 (1979).

¹⁰⁷ *Id.* at —, 393 N.E.2d at 1384.

Instead, the general view adopted by the cases seems to be that if a lawyer represents a criminal defendant who insists on taking the stand and committing perjury, the lawyer should move to withdraw, unless making the motion would prejudice the defendant before the trier of fact. In *In re Palmer*¹⁰⁸ the defense lawyer represented one of two individuals who were charged with manslaughter and leaving the scene of an accident. The defendants had agreed that one of them would testify that he was the driver when the other had actually been the operator of the vehicle. Although the defendant told his lawyer about the agreement, the lawyer continued to represent his client at trial. During the trial, the agreement was revealed. After the trial, the court conducted a hearing into the propriety of the lawyer's conduct and entered an order of indefinite suspension. The North Carolina Supreme Court affirmed on appeal and stated that when a lawyer learns prior to trial that his client intends to commit perjury, he must withdraw from representation, seeking leave of the court if necessary.¹⁰⁹ The court went on to state that the case did not deal with the more difficult question that arose if perjury took place during trial or if the motion were denied, citing ABA Standard 7.7 with approval.¹¹⁰

In *People v. Schultheis*¹¹¹ the defendant claimed on the morning of trial that he was not prepared to go to trial because his lawyer had refused to subpoena two witnesses. The lawyer informed the court that he had not done so because he knew the witnesses would testify falsely. After discussions between the defendant and his lawyer, the lawyer moved to withdraw. The court denied the motion. On appeal, the appellate court held that lawyers have an ethical obligation not to offer evidence known to be false and that lawyers should move to withdraw when confronted with such a situation. If the motion is denied, counsel should continue representation.¹¹²

In *State v. Trapp*¹¹³ the defense lawyer moved to withdraw because the defendant wished to offer perjured testimony to establish an alibi defense. The court denied the motion but acknowledged the defense lawyer's right and duty not to participate in perjury. The lawyer conducted *voir dire* and cross-examined the State's witnesses. The defendant made an opening statement on his own behalf and, with the assistance of the court, put on his own case. The defense lawyer did not participate in the defendant's case. Both the defendant and his lawyer made closing arguments to the jury. The appellate court held that the lawyer had a duty to withdraw.¹¹⁴ The court, however, went on to hold that the defendant's constitutional rights had been violated because the lower court had recognized the right to withdraw only in part.¹¹⁵ As a result, the defendant was unrepresented for a substantial part of the trial. The court held that this amounted to a denial of the right to effective assistance of counsel because the defendant had not made a knowing and intelligent waiver.¹¹⁶

¹⁰⁸ 296 N.C. 638, 252 S.E.2d 784 (1979).

¹⁰⁹ *Id.* at —, 252 S.E.2d at 291.

¹¹⁰ *Id.*

¹¹¹ — Colo. —, 638 P.2d 8 (1981).

¹¹² *Id.* at —, 638 P.2d at 13.

¹¹³ 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

¹¹⁴ *Id.* at —, 368 N.E.2d at 1281-82.

¹¹⁵ *Id.* at —, 368 N.E.2d at 1282.

¹¹⁶ *Id.* at —, 368 N.E.2d at 1282-83.

Case law establishes, however, that the duty to withdraw is qualified if the case is tried before a judge sitting without a jury. In such a situation, the motion to withdraw violates the defendant's rights to due process because it prejudices the finder of fact. The leading case establishing this proposition is *Lowery v. Cardwell*.¹¹⁷ At trial, the defendant took the stand and testified in a fashion that seems to have surprised his lawyer, who immediately asked for a recess and then moved to withdraw. The motion was denied. The lawyer then asked no further questions of the defendant and did not argue the defendant's testimony to the court. On appeal the United States Court of Appeals for the Ninth Circuit held that the motion resulted in a violation of the defendant's right to due process because it constituted an "unequivocal announcement" to the finder of fact, the judge, that the defendant was committing perjury. The court was careful to point out that it was not holding ABA Standard 7.7 unconstitutional. Indeed, the court specifically approved the standard.¹¹⁸ Instead, it ruled that the defendant's constitutional rights were violated because the lawyer failed to follow the standard, which specifically provides that a motion to withdraw shall not be made if the situation arises during trial.¹¹⁹ Similarly, the Supreme Court of Arizona¹²⁰ and the District of Columbia Court of Appeals¹²¹ have held that a motion to withdraw in a nonjury case because the defendant intends to take the stand and commit perjury violates due process because it prejudices the finder of fact. The cases indicate two solutions to the dilemma faced by defense lawyers in this situation—they may either forego the motion to withdraw and represent the defendant at trial in accordance with the ABA Standard¹²² or move to withdraw and to certify the case to another judge for trial.¹²³

If a motion to withdraw is denied or if the lawyer does not make the motion in order to avoid a violation of the defendant's due process rights, the cases have held that the lawyer should follow the limited representation approach outlined in the ABA Standard 7.7. The leading case establishing the propriety of compliance with Standard 7.7 is *Thornton v. United States*.¹²⁴ In *Thornton*, a prosecution for murder, armed robbery, and assault with a dangerous weapon, the defendant had predicated his defense on the theory that he had gone to the lounge where the events occurred but had not been involved in the robbery. On the eve of trial, he told his lawyer that he would raise an alibi defense instead: that he did not go to the lounge but had been hurt by an attacker while walking down the street. At trial the defense lawyer asked for a bench conference, moved to withdraw and to certify the case to a new judge. The judge granted the motion for certification and directed the second judge not to inquire into the factual basis for the motion. The second judge denied the motion to withdraw. The lawyer proceeded to trial. He allowed the defendant to testify in the narrative form outlined by Standard 7.7 and did not argue his testimony to the jury. On appeal the court approved the conduct of the lawyer, although it criticized the way in

¹¹⁷ 575 F.2d 727 (9th Cir. 1978).

¹¹⁸ *Id.* at 731.

¹¹⁹ *Id.*

¹²⁰ *Arizona v. Jefferson*, 126 Ariz. 341, 615 P.2d 638 (1980).

¹²¹ *Butler v. United States*, 414 A.2d 844 (D.C. 1980).

¹²² 575 F.2d at 731.

¹²³ 414 A.2d at 852.

¹²⁴ 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976).

which the certification procedure was carried out.¹²⁵

In *Maddox v. State*¹²⁶ the defendant was accused of murdering an inmate in a jail. The defendant had told his lawyers that he was watching television in a room away from the cell in which the murder took place and that he was not involved at all. During the trial, however, the defendant made a number of remarks to his lawyers which indicated that his alibi was untrue. Finally, in a conference with his lawyers he admitted that he was involved in the murder, but insisted that he had a right to take the stand on his own behalf. His lawyers moved to withdraw from the case, informing the judge that their client planned to commit perjury. The judge denied the motion to withdraw. At the defendant's request, the judge allowed him to represent himself in connection with his testimony, which he gave in narrative form. The next day the defendant moved to dismiss his lawyers and have new counsel appointed. The court denied this motion and ruled that the lawyers would remain in the case and participate in the defense to the extent that the defendant permitted. The defendant examined several witnesses and made the closing argument to the jury. His lawyers gave him advice when he requested. The appellate court held that the defendant's constitutional rights were not violated by presentation of testimony in narrative form. Further, the court ruled that the motion to withdraw, even though not sanctioned by Standard 7.7, did not violate the defendant's rights.¹²⁷ The court initially ruled that the defendant's rights were violated because he was not adequately informed of the consequences of *pro se* representation, but on rehearing, the court reversed itself, affirming the conviction, because the lawyers had remained in the case to advise the defendant.¹²⁸

Similarly, in *United States v. Campbell*¹²⁹ the United States Court of Appeals for the Ninth Circuit held the defendant's constitutional rights were not violated when his lawyer attempted to follow Standard 7.7 in a jury trial in which the defendant insisted on taking the stand to testify in a manner contrary to the lawyer's advice. While the court found that the lawyer had not complied with Standard 7.7, it ruled that the defendant had not been prejudiced. Further, the court reiterated the approval of Standard 7.7 that it had given in *Lowery v. Cardwell*.¹³⁰

One explanation for the failure of the drafters of the Model Rules to adopt Standard 7.7 is that they may have been fearful that the Standard was unconstitutional. Examination of the case law, however, indicates such fears are unfounded. Standard 7.7 has been expressly approved by several courts.¹³¹ Indeed, the United States Supreme Court has twice cited the standard with approval.¹³² While it is true that a few courts have found constitutional violations in connection with the efforts by lawyers to deal with client perjury, none of these cases

¹²⁵ *Id.* at 434-38.

¹²⁶ 613 S.W.2d 275 (Tex. Crim. App. 1981).

¹²⁷ *Id.* at 283-84.

¹²⁸ *Id.* at 286.

¹²⁹ 616 F.2d 1151 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980).

¹³⁰ *Id.* at 1152-53.

¹³¹ *Id.* at 1152; 414 A.2d at 849; *People v. Lowery*, 52 Ill. App. 3d 44, —, 366 N.E.2d 155, 157 (1977) (certiorari denied by the Illinois Supreme Court).

¹³² *United States v. Grayson*, 438 U.S. 41, 54 (1978); *Halloway v. Arkansas*, 435 U.S. 475, 480 n.4 (1978).

questions Standard 7.7. *State v. Robinson*,¹³³ a North Carolina case, is illustrative. In *Robinson* a dispute developed between the defense lawyer and his client because the lawyer claimed that the defendant wished to testify falsely and to offer a witness who would testify perjurally. The lawyer moved to withdraw, but the court denied the motion. The defendant did not testify, but he called his witness. The lawyer asked preliminary questions. At that point, the lawyer ceased his examination of the witness and turned the matter over to the defendant. The North Carolina Supreme Court held that this procedure resulted in a violation of due process because it clearly conveyed to the jury that the lawyer did not believe the testimony of the witness and that the defendant and his lawyer were at odds.¹³⁴ *Robinson* does not stand for the proposition that Standard 7.7 is unconstitutional. First, the case involved the testimony of a witness rather than that of a defendant. Second, the procedure followed was not at all like the narrative recommended by Standard 7.7. Last, the standard was not even discussed by the court. Indeed, in a subsequent case, the North Carolina Supreme Court indicated its approval of Standard 7.7.¹³⁵ Similarly, in other cases that have found constitutional violations, Standard 7.7 was either not discussed¹³⁶ or the conduct of the lawyer did not comply with its provisions.¹³⁷

Although the drafters of the Model Rules argue that disclosure of perjury should be required in order to increase truthful results in the criminal process, it is doubtful that a disclosure rule will serve this purpose. First, few criminal defendants who go to trial are acquitted. It is hard to imagine that a significant number of acquittals result from perjured testimony. Thus, a disclosure rule would affect the outcome in an insignificant number of cases. Second, the system has substantial safeguards against perjury. The trier of fact scrutinizes the credibility of witnesses. The prosecution has the potent weapon of cross-examination. Indeed, recent Supreme Court cases go so far as to allow the prosecution to use incriminating statements made by defendants for purposes of cross-examination, even though such statements would otherwise be inadmissible.¹³⁸ Third, a disclosure rule can easily be circumvented by lawyers informing criminal defendants at the beginning of representation of the ethical obligation to disclose.¹³⁹ As a consequence, the number of situations in which lawyers "know" about perjury is likely to be quite small. Last, a disclosure rule may make the criminal process less fair. It is well known that substantial barriers to frank communication already exist between criminal defendants and their lawyers. The existence of a disclosure rule is likely to exacerbate the problem. As a consequence, clients may be more reluctant to communicate unfavorable information to their lawyers. The result of this may be that lawyers evaluate the strength of their clients' cases

¹³³ 290 N.C. 56, 224 S.E.2d 174 (1976).

¹³⁴ *Id.* at —, 224 S.E.2d at 180.

¹³⁵ *In re Palmer*, 296 N.C. 638, —, 252 S.E.2d 784, 791 (1979).

¹³⁶ *See, e.g.*, *State v. Trapp*, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

¹³⁷ *See, e.g.*, *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

¹³⁸ *United States v. Havens*, 446 U.S. 620 (1980) (prosecution may use an inadmissible statement for purposes of impeachment of statements made by defendant in cross-examination); *Harris v. New York*, 401 U.S. 222 (1971) (prosecution may use an inadmissible statement for purposes of impeachment of direct testimony).

¹³⁹ Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 688 (1978).

with less precision than they would without the disclosure rule. This, in turn, could lead to poorer results both in plea bargaining and at trial for defendants.

Another policy argument in support of a disclosure rule—one not made by the drafters of the Model Rules—is based on the social interest in maintaining respect for the criminal system. Unless the public believes the criminal system is fair, the stability of the social order is threatened. If the public believes that lawyers countenance perjury, their trust in lawyers and, ultimately, in the system of criminal justice decreases. While this argument has some force, it does not follow that it supports a duty to disclose perjury. The social policy of respect for lawyers and the criminal system can be protected without a rule that requires lawyers to disclose perjury. It would seem that public respect for the system is adequately protected if rules of ethics state that perjury is not countenanced by the legal profession, that lawyers have the duty to urge defendants not to commit perjury, and that lawyers will not promote or use perjured testimony in any fashion. The ABA Defense Standard, which limits the lawyer's involvement in the perjured testimony, seems to meet these requirements. Further, a disclosure rule might well undermine respect for the system of justice. As noted above, such a rule can easily be circumvented by lawyers informing criminal defendants of their ethical obligations at the beginning of the relationships. A rule that can so easily be avoided by a ritualistic act can only promote disrespect.

The foregoing analysis indicates that the position taken by the Model Rules on the problem of perjury by criminal defendants is not supported either by the case law or by policy. The following is a proposed addition to Rule 3.3 that generally follows the proposed revised ABA Standard for the Defense Function.¹⁴⁰

If the defendant in a criminal case wishes to testify in his own behalf and counsel knows, either from independent investigation or from the admissions of the defendant, that the testimony will be perjurious, counsel must strongly discourage the defendant from taking the witness stand to testify perjurally. If the defendant insists on doing so, the lawyer may move to withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so. If the lawyer moves to withdraw in a nonjury case, he shall also move to have the case certified to another judge for trial.

If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying prejuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the

¹⁴⁰ This Article favors adoption of the 1979 proposed Standard 7.7 rather than the original version or the recent "Exum" proposal. *See supra* note 99. The Exum proposal undermines the policy of noninvolvement by lawyers in perjury because it allows lawyers to ask questions and argue perjured testimony in some instances. Further, the proposal seems difficult to apply because lawyers will have problems determining when they must ask questions to avoid revealing the perjury. The 1979 Standard also seems preferable to the original Standard 7.7. Under the original version, lawyers were required to withdraw. This could pose constitutional problems in nonjury cases. Further, by forcing lawyers not to engage in any examination the Standard could result in the fact finder being informed of the perjury. The proposed Standard 7.7 allows conventional examination so long as the lawyer does not believe the answers will be perjurious. It thus minimizes the likelihood that the finder of fact will know of the perjury. Further, the Standard maintains the strict requirement that lawyers not ask questions that elicit perjured testimony or argue the perjury to the finder of fact. The policy of maintaining respect both for lawyers and for the criminal system thus remains intact.

While the case law that has considered Standard 7.7 dealt with the original version, the 1979 proposal should also be constitutional since it is more protective of the rights of defendants than the original version.

perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of fact. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and many not recite or rely upon the false testimony in his or her closing argument.

Although the approach taken by the Model Rules for dealing with perjury in criminal cases is not supported by case law or policy, the approach is valid for civil cases. There, the case law offers stronger support for a duty to reveal the perjury to the tribunal.¹⁴¹ Further, the policy considerations in civil cases support a duty to disclose perjury, while they do not in criminal cases. In civil cases, perjury affects the legal rights of the opposing party as well as the social interest in truthful resolution of disputes and respect for the system of justice. Thus, in civil cases, a more compelling argument can be made for a disclosure obligation.

2. Misrepresentation and Fraud on a Tribunal: Model Rule 3.3

Concern for the interest of the system of justice is reflected in another disclosure provision of the Model Rules, the duty to disclose facts to a tribunal if the failure to disclose would amount to a material misrepresentation. This rule, like the similar rule that deals with the disclosure obligations to third persons, also suffers from a problem of lack of clarity. A well-known disclosure problem is described by Professor Williston in his autobiography.¹⁴² Williston had reviewed his client's correspondence file. Although the file contained information damaging to his client's case, the other side had failed to obtain it through discovery. At the trial, the judge announced his decision from the bench, relying on a factual matter that Williston knew was not true because of information contained in the client's correspondence. Despite this knowledge, Williston said nothing to the court, and a judgment was entered in his client's favor. In another situation, the ABA Committee on Professional Ethics and Grievances was asked whether a lawyer had a duty to inform a court that it was about to impose a sentence based on misinformation that the defendant did not have a criminal record.¹⁴³ The Committee ruled that the lawyer could not reveal the client's record if he had learned the fact from the client. If the lawyer had learned the fact from other sources, the Committee ruled that the lawyer had a duty of disclosure if it was apparent that the court was relying on the lawyer's silence as confirmation of the court's belief that the defendant did not have a record.

¹⁴¹ *Hinds v. State Bar*, 19 Cal. 2d 87, 119 P.2d 134 (1941); *In re Ellis*, 155 Kan. 894, 130 P.2d 564 (1942); *In re Carroll*, 244 S.W.2d 474 (Ky. 1951); *In re King*, 7 Utah 2d 258, 322 P.2d 1095 (1958). A few cases, however, have held that withdrawal without disclosure is the appropriate course of action. *Grievance Comm'n v. Malloy*, 248 N.W.2d 43 (N.D. 1976); *In re A*, 276 Or. 225, 554 P.2d 479 (1976).

¹⁴² S. WILLISTON, *LIFE AND LAW* 271 (1940).

¹⁴³ ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).

How these cases would be resolved under the Model Rules is unclear. They are not mentioned in the comments. To remedy this lack of clarity, the rule should be redrafted to make clear when a failure to disclose amounts to a material misrepresentation. The following is a suggested revision to current Rule 3.3(a)(1):

A lawyer shall not knowingly:
make a false statement of fact or law to a tribunal;
fail to disclose matters of fact or law if disclosure is necessary to correct a statement previously made by the lawyer which the lawyer now knows is false;
fail to disclose matters of fact or law if the disclosure is necessary to prevent a statement made by the lawyer that is literally true from being so incomplete that it is misleading; or
fail to disclose matters of fact or law if it is clear to the lawyer that the judge is relying on the lawyer's silence as confirmation of a statement of fact or law made by the judge.¹⁴⁴

The Model Rules also require a lawyer to disclose a fact if necessary to prevent fraud on a tribunal.¹⁴⁵ The comments indicate that the concept of fraud on a tribunal is defined by local law. The clarity of this Rule can be improved, however, because case law provides guidance about what constitutes fraud on a tribunal. The cases indicate that to establish fraud on a tribunal, there must be a showing of improper conduct by a lawyer, judge or juror.

The leading case on the concept of fraud on a tribunal is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*¹⁴⁶ In order to enhance its efforts to obtain a patent, Hartford obtained the publication, in trade journals, of an article favorable to its invention. The article was ostensibly authored by an expert but in fact written by Hartford's lawyer. In pursuing the patent application and in subsequent litigation for patent infringement against Hazel-Atlas, Hartford relied on the article. The United States Court of Appeals for the Third Circuit relied on the article in upholding Hartford's claim for infringement. When the fraud was discovered, sixteen years later, Hazel-Atlas brought suit to reopen the judgment for infringement. The Supreme Court held that the judgment should be vacated, stating that Hartford's conduct constituted a deliberately planned scheme to defraud the Patent Office and the court.¹⁴⁷ The court was careful to distinguish the situation from mere perjury by a witness, which it stated would not be sufficient to constitute fraud on the court. In *Hazel-Atlas* the fraud involved misconduct by a lawyer.

Similarly, the recent case of *Rozier v. Ford Motor Co.*¹⁴⁸ involved misconduct by a lawyer. The plaintiff had made a request in interrogatories for reports that dealt with the comparative advantages of alternative locations for fuel tanks. The defendant responded that it could not find any such report. A month later, before trial, the defendant's in-house lawyer discovered such a report, but failed

¹⁴⁴ The last part of the proposed Rule defines when a lawyer has a fiduciary duty to a court to disclose facts adverse to his client. A similar duty to disclose facts to a third person exists if there is a fiduciary relationship with that person. See *supra* text accompanying note 91.

¹⁴⁵ ABA Proposed Final Draft, *supra* note 13, Rule 3.3(a)(2).

¹⁴⁶ 322 U.S. 238 (1944).

¹⁴⁷ *Id.* at 250.

¹⁴⁸ 573 F.2d 1332 (5th Cir. 1978).

to disclose it or to have the answer to the interrogatory amended. After a jury verdict for the defendant and during the pendency of the appeal, the existence of the document came to light. The United States Court of Appeals for the Fifth Circuit held that the lawyer's failure to disclose amounted to fraud on the court, warranting reopening of the judgment.¹⁴⁹

Bribery or improper influence of a judge also constitutes fraud on a court. In *Root Refining v. Universal Oil Products*¹⁵⁰ a lawyer was employed to assist in the prosecution of a case for patent infringement, primarily because of his influence with the judge in the case. The court of appeals held that the allegations were sufficient to warrant reopening the judgment because of fraud on the court.¹⁵¹ While there do not seem to be any cases dealing with bribery of a juror, in dictum one court has stated that bribery of a juror also amounts to fraud on a tribunal.¹⁵²

In contrast, if misconduct occurs in a judicial proceeding without improper conduct of either a lawyer, judge, or juror, fraud on a court has not occurred. For example, mere nondisclosure of facts by a lawyer is not fraud on a court.¹⁵³ Similarly, fraudulent responses to discovery, without the involvement of lawyers, do not constitute fraud on a court.¹⁵⁴

The rule requiring disclosure to prevent fraud on a court contains an ambiguity in the use of the word "prevent." Must a lawyer disclose if he learns of the fraud after it has occurred? The drafters almost certainly intended the obligation to attach whether the lawyer learned of the fraud before or after its occurrence. The related rule dealing with false evidence requires the lawyer to make disclosure whether the falsity of the evidence is discovered in advance of or after its presentation.¹⁵⁵ To eliminate this ambiguity the rule should be redrafted. The following is a proposed revision to the Model Rule that incorporates solutions to these criticisms:

A lawyer shall not knowingly fail to disclose facts establishing fraud on a tribunal. Fraud on a tribunal means bribery or improper influence of a judge or juror by any person or the fabrication or concealment of evidence by a lawyer involved in the proceedings before the tribunal.

The Discussion Draft contained a provision that gave lawyers discretion to reveal evidence favorable to the opposing side.¹⁵⁶ This provision, which was based on arguments made by Judge Frankel,¹⁵⁷ has been eliminated from the Model Rules. This decision seems sound. While the purpose of the Rule was to promote truth in the judicial process, the Rule would probably have had little impact. First, because of the existence of the discovery system, most important adverse factual information can already be obtained by the opposing side. The Rule would apply only in those cases in which the opposing lawyer fails to use

¹⁴⁹ *Id.* at 1346.

¹⁵⁰ 169 F.2d 514 (3d Cir. 1948).

¹⁵¹ *Id.* at 541.

¹⁵² *Petry v. General Motors Corp.*, 62 F.R.D. 357, 361 (E.D. Pa. 1974).

¹⁵³ *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833 (5th Cir. 1980); *Kupperman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972).

¹⁵⁴ 62 F.R.D. at 361.

¹⁵⁵ ABA Proposed Final Draft, *supra* note 13, Rule 3.3(a)(4).

¹⁵⁶ Discussion Draft, *supra* note 6, Rule 3.1(e).

¹⁵⁷ Frankel, *supra* note 4.

the discovery system thoroughly. Second, because of the incentives that lawyers have to favor the interests of their clients, it would be rare for a lawyer to exercise his discretion to reveal adverse evidence. Finally, such a Rule might produce inefficiency in the judicial process. Disclosure of adverse evidence, if it occurred at all, would not take place until relatively late in the proceedings. This might produce either retrials or continuances. Thus, on balance, it seems clear that the arguments in favor of a rule that would allow lawyers to disclose adverse evidence are not sufficiently strong to overcome the presumption in favor of confidentiality.

3. *Professional Misconduct by Other Lawyers: Model Rule 8.3*

A conflict between the client's interest in confidentiality and the interest in protecting the integrity of the system of justice arises in connection with another of the proposed Model Rules. Model Rule 8.3 deals with the obligation of lawyers to report professional misconduct by other lawyers. The Rule requires a lawyer to disclose serious misconduct by another lawyer, but the Rule provides that the obligation to make disclosure is subject to the duty of confidentiality. Consider the example of a lawyer who represents the wife of another lawyer in a divorce case. The wife informs the lawyer that her husband is involved in the importation and sale of heroin. Under the Model Rules, the wife's lawyer would be precluded from disclosing this information because it was received in a communication that is subject to the duty of confidentiality. The comments indicate that the lawyer should, however, urge the client to consent to disclosure.¹⁵⁸ Yet, a lawyer who is involved in illegal conduct, such as the sale of heroin, is engaged in acts that harm others, the profession, and possibly his future clients. Prevention of such serious harm would seem to outweigh the client's interest in confidentiality.¹⁵⁹ In addition, the Rules give lawyers discretion to reveal confidential information to collect a fee or defend charges of misconduct. Surely, avoidance of the harm that results from serious misconduct by lawyers is an equally persuasive rationale for allowing disclosure. A better rule would give lawyers discretion to reveal confidential information that establishes serious misconduct by another lawyer. With discretion, lawyers could weigh the harm that would result to the client from disclosure against the seriousness of the misconduct.

C. *Disclosure to Protect the Interests of Lawyers*

Some disclosure problems involve a conflict between the interests of lawyers in self-protection and those of clients in confidentiality. For example, in *Meyerhofer v. Empire Fire & Marine Insurance Co.*¹⁶⁰ a purchaser of stock brought an action against a corporate defendant and its lawyers for alleged violations of the securities laws. The lawyer contacted the plaintiff's lawyers and informed them that he had advised against the conduct that was the basis of the litigation. Based on this information, the plaintiff dismissed the claim as to this lawyer. Subsequently, the defendant moved to disqualify the plaintiff's lawyers on the ground that they had impermissibly received confidential information. The appellate

¹⁵⁸ ABA Proposed Final Draft, *supra* note 13, Rule 8.3 comment.

¹⁵⁹ See *supra* text accompanying notes 59-64.

¹⁶⁰ 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1975).

court reversed the lower court's disqualification of the plaintiff's lawyers, holding that a lawyer may disclose confidential information under the Code of Professional Responsibility to defend himself against a charge of wrongdoing.¹⁶¹

One approach to resolving the conflict between the client's interest in confidentiality and the lawyer's interest in self-protection is to allow disclosure only when the client has taken some action that can reasonably be viewed as a "waiver" of the right of confidentiality. The ATLA Code adopted this approach in Rule 1.4 of Alternative B, which allows a lawyer to disclose confidential information to defend against formally instituted charges, "but only when the charge, claim or complaint is at the initiation or insistence of the client."¹⁶² One difficulty with this approach is that it simply does not seem sufficiently protective of the legitimate interests of lawyers. For example, under the Rule, disclosure would be improper in the *Meyerhofer* case. A lawyer under this approach could be subject to extreme civil liability and even disbarment, and yet be unable to defend himself. Such an approach is inconsistent with the principle advocated in Part II of this Article, that disclosure should be permitted to prevent serious harm to the legal rights of a person.

A second approach to resolving the conflict, that adopted by the Code of Professional Responsibility,¹⁶³ allows a lawyer to disclose information to protect his legal rights. The Code allows disclosure to enable a lawyer to collect a fee or to defend charges of wrongdoing. This approach, however, suffers from a flaw converse to that of the ATLA Code; it is overly protective of the interests of lawyers. For example, under the Code, it would appear to be proper for a lawyer to threaten to reveal confidential information in order to coerce a client to pay a fee or to use confidential information in supplementary proceedings to collect a fee. The interest in fee collection does not seem sufficiently significant to warrant disclosure in such cases.

The Model Rule adopts a compromise between these two approaches.¹⁶⁴ The Rule provides that a lawyer may disclose confidential information to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or a civil claim against the lawyer, based on conduct in which the client was involved. Thus, the Rule limits the disclosure allowed under the Code in two ways. The Rule appears to limit the nonjudicial use of confidential information to collect a fee. Further, the Rule allows a lawyer to disclose information to defend criminal or civil charges brought against the lawyer, but only based on conduct in which the client was involved.

One question that could be asked about the Rule is whether the interest of lawyers in collection of fees is sufficiently important to warrant disclosure of confidential information. The Rule indicates that it is, but this seems unsound. The rationale for disclosure of confidential information should be to prevent serious violations of legal interests.¹⁶⁵ A Rule that allows lawyers to disclose confidential information to collect a fee seems too broad in light of this principle. Instead,

¹⁶¹ *Id.* at 1194-95.

¹⁶² ATLA Code, *supra* note 11, Rule 1.4 (Alternative B).

¹⁶³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980).

¹⁶⁴ ABA Proposed Final Draft, *supra* note 13, Rule 1.6(b)(4).

¹⁶⁵ See *supra* text accompanying notes 59-64.

lawyers should be allowed to reveal confidential information to collect a fee only if the client is refusing to pay the fee in bad faith.

A second question about the Rule is whether disclosure should be limited to controversies between lawyer and client or should be allowed in controversies with third persons. The Rule allows lawyers to disclose confidential information to defend themselves against charges brought by third persons based on conduct in which the client was involved. The principle of avoidance of serious harm to legal interests dictates that lawyers should be allowed to reveal information in order to defend claims brought by third persons as well as those brought by clients. The limitation to claims in which the client was involved, therefore, seems unsound because the harm to the legal rights of lawyers is the same regardless of whether the client was involved in the conduct giving rise to the suit. Furthermore, the difference between the two formulations of the disclosure rule is unlikely to have much of a bearing on the degree to which clients consult with lawyers. Thus, on balance, it seems that a broader rule, which would allow lawyers to disclose confidential information to defend civil or criminal charges, regardless of whether client conduct was involved, is the sounder rule.

The following is a suggested revision of Rule 1.6(b)(4):

- (4) To establish a claim by a lawyer for a fee if the client refuses to pay the fee in bad faith or to defend a criminal charge or civil claim against the lawyer brought by the client or a third person.

D. Disclosure to Protect the Interests of Clients

The Model Rules have several provisions that allow lawyers to disclose confidential information when the disclosure would be in the client's interest. Rule 1.6(a) provides that a lawyer may reveal confidential information if the client consents after being advised by the lawyer of all consequences. Rule 1.6(b)(1) provides that a lawyer may reveal confidential information to serve the client's interest unless the client has specifically requested that it not be disclosed. Rule 1.6(b)(1) should only apply when the client is unavailable or is unable to make an informed decision. In other situations in which the client is available, disclosure should be made only if the client has consented after full disclosure.

The principle that a lawyer may disclose confidential information when it would be in the client's interest to do so is difficult to apply in the context of a lawyer representing an organization. The typical organization includes a multitude of interests, such as the board of directors, management, and shareholder groups, which may conflict with each other. How is a lawyer to decide when disclosure would be in the client's interest?

One solution to the problem would be to provide that a lawyer employed by an organization should act only in the interest of the particular representative of the organization with whom he deals. Such an approach, however, is both unwise as a matter of policy as well as inconsistent with the view of the lawyer's role adopted by the cases. As a matter of policy, such a conception of the lawyer's role would pose serious practical problems. Each separate interest group in an organization would have to have its own counsel. The approach ignores the realities of corporate practice, in which counsel advises a variety of representatives of organizations. Further, even this approach would not resolve the problem of de-

ciding what was in the client's interest. How would a lawyer who represented the board of directors decide what was in its interest?¹⁶⁶

In addition, the approach is inconsistent with case law, which has generally held that a lawyer employed by an organization has duties beyond those owed to the particular official with whom he deals. For example, in *Garner v. Wolfinbarger*¹⁶⁷ the United States Court of Appeals for the Fifth Circuit held that the attorney-client privilege did not apply absolutely to a stockholders' suit against a corporation and its officers charging violation of the securities laws. Instead, the court held that the privilege would not apply if a showing of good cause could be made.¹⁶⁸ In its decision the court relied on a traditional exception to the attorney-client privilege, the joint client exception. Similarly, in *Lane v. Chowning*¹⁶⁹ the United States Court of Appeals for the Eighth Circuit held that lawyers for a bank could not be liable for breach of fiduciary duty to the former president and chief executive officer of the defendant because the lawyers' professional obligations ran to the interest of the organization as a whole rather than to the president.¹⁷⁰

Another approach to the problem, the reverse of that just recommended, would be to hold that a lawyer should always act in what he considered to be the best interest of the organization. This approach also seems unsound. It would put the lawyer in the role of making essentially management decisions. Why should the lawyer make such decisions when the management of the corporation has the authority to do so, especially since the lawyer will not always have complete information?¹⁷¹

The Model Rule seems to be a well thought out accommodation of the view that lawyers cannot simply look to the interest of particular representatives of organizations, nor can they exercise general management authority.

The Rule first identifies the organization—rather than its officers, directors, or shareholders—as the client.¹⁷² The Rule provides that if a person associated with the organization intends to act in a manner inconsistent with his or the organization's legal obligations, and material harm to the organization is likely to result, the lawyer shall take reasonable steps to protect the interests of the organization. Such steps include asking for reconsideration, asking that a separate legal opinion be obtained, referring the matter to higher authority in the organization, including ultimately to the board of directors, and finally, revealing information outside of the organization.¹⁷³ However, the Rule provides that revelation shall be made only if the lawyer reasonably believes that "(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interests of the

¹⁶⁶ Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1335 (1981) [hereinafter cited as *Developments*].

¹⁶⁷ 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub nom.* *Garner v. First Am. Life Ins. Co.*, 401 U.S. 975 (1971).

¹⁶⁸ *Id.* at 1104.

¹⁶⁹ 610 F.2d 1385 (8th Cir. 1979).

¹⁷⁰ *Id.* at 1388-89.

¹⁷¹ See *Developments*, *supra* note 166, at 1336.

¹⁷² ABA Proposed Final Draft, *supra* note 13, Rule 1.13(a).

¹⁷³ *Id.* Rule 1.13(b).

organization.”¹⁷⁴

There is one point of clarification that could be made in the Rule. The Rule seems to provide that disclosure can be made outside an organization only when the two conditions in the Rule are met. Yet, the comments indicate that the disclosure provisions of the Rule are in addition to the provisions under other Model Rules. Thus, there are a variety of situations in which disclosure may be discretionary or required in addition to those found in 1.13(c). This should be made clearer by appropriate reference in the text of 1.13(c).

IV. CONCLUSION

The Proposed Model Rules of Professional Conduct are an important effort by the profession to address the confusion that has been building over the last decade on a variety of problems of professional ethics. The drafters of the Model Rules made a fundamentally correct decision to reject a strict view of confidentiality in favor of limited protection. The Rules, however, suffer from the lack of a clear set of principles that can be used to develop rules of confidentiality. This Article has argued that four principles should be adopted: a presumption in favor of confidentiality, consistency between legal and ethical requirements, disclosure to protect the interests of clients and to avoid serious harm to other legally protected interests, and clarity in ethical obligations. Based on these four principles, the Article has developed a critique of the Model Rules and proposed several revisions.

APPENDIX

Rule 1.6 *Confidentiality of Information*

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) to serve the client's interests, unless it is information the client has specifically requested not be disclosed;

(2) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(5) to comply with the Rules of Professional Conduct or other law.

Rule 3.3 *Candor Toward the Tribunal*

(a) A lawyer shall not knowingly:

¹⁷⁴ *Id.* Rule 1.13(c).

(1) make a false statement of fact or law to a tribunal, or fail to disclose a fact in circumstances where the failure to make the disclosure is the equivalent of the lawyer's making a material misrepresentation;

(2) fail to make a disclosure of fact necessary to prevent a fraud on the tribunal;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise confidential under Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Caveat: Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this Rule.

Rule 4.1 *Truthfulness in Statements to Others*

In the course of representing a client a lawyer shall not:

(a) knowingly make a false statement of fact or law to a third person; or

(b) knowingly fail to disclose a fact to a third person when:

(1) in the circumstances failure to make the disclosure is equivalent to making a material representation;

(2) disclosure is necessary to prevent assisting a criminal or fraudulent act, as required by Rule 1.2(d); or

(3) disclosure is necessary to comply with other law.

Rule 1.13 *Organization as the Client*

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation, that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in material injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization

and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. The measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When a matter has been referred to the organization's highest authority in accordance with paragraph (b), and that authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information relating to the representation of the organization only if the lawyer reasonably believes that:

- (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
- (2) revealing the information necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when necessary to avoid misunderstandings on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions regarding conflict of interest stated in Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented.

